erroneous conclusion that McEntee had received a party endorsement:

> Clearly, you have been endorsed by the Bernalillo County Republican Party and have advertised this endorsement. Thus the election for Albuquerque mayor is partisan . . . (emphasis added).

The OSC was wrong about the claimed endorsement. The endorsement McEntee received was not by any national, state or county Republican Party, nor was it received as the result of any caucus, or primary election process to represent the Republican Party. The endorsement was from certain individual members of the Executive Committee of the Bernalillo County Republican Party. This committee has no role with regard to endorsements by the Republican Party and has no formal Party function whatsoever. McEntee was unaware of the existence of the committee (an appointed group involved in "advisory fundraising" or "outreach" for the chairman of the County Party) until the very day some of its members endorsed him. Federal Circuit App. Rec. A 364-370. He did not seek any endorsement, from the Executive Committee or the national, state or local Republican Party. A 790-792; 1098-1102. At no time did McEntee claim to represent the Republican Party and, in fact, when he was asked, he specifically denied it. A 652, 738, 1377-1379.

Three times in September 2001, after receipt of the OSC's demand McEntee's counsel pointed out the OSC's error with regard to the claimed endorsement by the Bernalillo County Republican Party and respectfully requested guidance in writing: "If the Office of Special Counsel has any additional authority or precedent that suggests, in a nonpartisan race, the possible violation of the Hatch Act without a party endorsement. . . ." The OSC has never produced any such rules, guidelines or precedent either during the campaign or during subsequent discovery. Nor did the OSC at any time respond to repeated requests for help in locating either the line be-

tween "acceptable" and "unacceptable" speech, or the methodology for locating that line.

2. The OSC and MSPB's Enforcement of the *Broering* Transformation Theory.

After the mayoral race was over (and McEntee was not elected), the OSC charged McEntee with violations of the Hatch Act, 5 U.S.C. § 7323(a)(2) and (3). The OSC did not contend that McEntee had "represented a major political party" or had "acted in concert with a major political party" or that he had engaged "in speech and conduct that indicate he is acting in concert with a major political party," the test proposed by the Federal Circuit (23a), but rather the OSC charged that McEntee "took actions during his campaign to hold himself out as the only conservative Republican candidate, receiving the endorsement of the Bernalillo County Republican Party Executive Committee, accepting and advertising his endorsement by Republicans, and stating in campaign literature that his candidacy was the "only hope for defeating the Democrat machine. . . ." According to the OSC, these actions and speech "caused the election to become a partisan election, and resulted in his candidacy violating the Hatch Act provisions. . ." A 645-647.

Citing the *Broering* transformation theory, the government argued that some statements by McEntee, statements about McEntee, and endorsements by several groups with Republican members had crossed the line between "acceptable" and "unacceptable" speech. Without identifying either the line or the methodology used to establish when the line was crossed, the OSC also charged McEntee with a separate Hatch Act violation for soliciting contributions in a campaign for a nonpartisan office that allegedly had been transformed into an election for a partisan political office.

Government prosecutors pursued any mention of the word "Republican" or any association with Republicans or the

Republican Party that might have "infected" the race. The OSC demanded that McEntee (and "his agents, attorneys, representatives and anyone acting on his behalf") disclose every conversation with any Bernalillo County Republican prior to the election (A 84-96, 106, 504-505), a group exceeding 130,000 in number. Contacts with certain groups endorsing McEntee (the Lincoln Caucus, the Republican Assembly and members of the Executive Committee of the Bernalillo County Republican Party) were also demanded apparently to determine if the groups were unacceptably Republican. *Id.*

The MSPB determined the election (at some unspecified point) became simply "too" partisan because the Respondent repeatedly described himself as a "conservative Republican" during campaign events. 46a.

> These examples provide overwhelming evidence that the Respondent not only openly campaigned as a Republican but was labeled a Republican in this campaign by the press and others. It is clear from the evidence that partisan politics not only extended to the campaign of the Respondent, but played a key and substantial role. 48a.

The MSPB found that the OSC had erred in its original claim that the Bernalillo County Republican Party had endorsed McEntee. McEntee simply did not receive the endorsement claimed by the OSC. The MSPB nonetheless found that McEntee "trumpeted" the endorsement by members of the Bernalillo County Republican Party Executive Committee by "prominently advertising the endorsement" via draft documents found only in McEntee's records. The OSC presented no evidence the drafts ever left McEntee's files.

In truth, McEntee received no support of any type from the national, state or county Republican Party or the Executive Committee. A 790-792, 1098-1102, 1377-1379. He received no financial assistance from these entities. A 1377-1379,

1102-1103. He did not seek the endorsement of the Bernalillo County Republican Party Executive Committee. *Id.* Prior to the endorsement by some members of the Executive Committee, McEntee was unaware of the existence of the Executive Committee. The Executive Committee has no role with regard to endorsements or, for that matter, any formal party functions. The Executive Committee has "no power; it is more advisory than anything" according to the Bernalillo County Republican Party Chairman. In short, McEntee was not nominated, elected, or selected to represent the Republican Party. McEntee established he was not representing the Republican Party. A 652, 738, 1377-1379.

The MSPB did not find that McEntee represented the party or that he was "acting in concert with the Republican Party." Rather, the MSPB determined the race was "perceived" as partisan by the public and the perception was caused by McEntee. Both findings were disputed. The ALJ relied on newspaper articles (over the objections of McEntee) and rejected all uncontroverted admissible evidence to the contrary from McEntee's qualified expert. A 1104, 1106.

McEntee did not dispute that he had described himself as a Republican and also a conservative Republican before and during the mayoral race. McEntee admitted he had been endorsed by a variety of private groups, unaffiliated with the national, state or county Republican Party, but whose members included registered Republicans, such as the Lincoln Caucus, the Republican Assembly and the New Mexico Right-to-Life Committee.

The MSPB, citing unpublished draft documents from McEntee's campaign, and several newspaper articles, and using unspecified criteria, determined that McEntee "played a key and substantial role" in establishing a "pervasive and influential aura of partisanship." The MSPB determined that

McEntee had crossed the line between acceptable philosophical speech and unacceptable speech:

> Alas, he [McEntee] would have had a stronger case had he stopped after simply identifying himself as a conservative, a less loaded description than the one he used and one that would not necessarily connote a political party. . . . Respondent stepped over the line that might distinguish mere philosophical rhetoric from prohibited political partisanship. 48a.

Without identifying any guidelines for distinguishing acceptable "mere philosophical rhetoric" from "prohibited political partisanship," the MSPB held that the determination of the transformation was a matter of judgment based on "an analysis of transformation evidence, a necessarily fact-specific element that could only be determined conclusively after litigation." (emphasis added) 33a. The MSPB noted with approval that the OSC's letter of August 31, 2003 had the effect the OSC intended: "[t]he Respondent removed the word Republican from materials he distributed after he was contacted by the Special Counsel. Thus, in a sense, at least, it can be said that the Respondent ceased the activities that had transformed the campaign." 34a.[3] The MSPB, however, found that while McEntee had eliminated unacceptable references to the word "Republican," after the OSC demand on August 31, 2001, *ipsa dixit* the ALJ determined an "unacceptable" level of partisanship remained (by McEntee's past use of the word "Republican") and "lingered" in the waning days of the campaign. 34a.

Despite the fact that McEntee's candidacy had a positive impact on the FAA and encouraged more interest in civic and political issues, and the government presented no evidence of any harm or damage of any type (A 1108-1110, 1380), the ALJ found a suspension of 120 days was necessary as "a

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[3] *See* Overbreadth, *infra* at Section B(5).

sufficient inoculation against recurrence of the 'bug' that often afflicts those with visions of public office." 36a.

3. The Federal Circuit's Test: Acting in Concert with a Major, Partisan Political Party

On April 15, 2005, the United States Court of Appeals for the Federal Circuit affirmed the MSPB decision. 1a-26a. The Federal Circuit identifies "partisan political office" as the statutory "key language" as applied by the MSPB. The statute and the regulations provide: [a] "partisan political office" means "any office for which any candidate is nominated or elected as representing a party any of whose candidates for Presidential elector received votes in the last preceding election at which Presidential electors were selected." 5 U.S.C. § 7322(2) (2000). The Federal Circuit correctly identifies portions of the Hatch Act Amendments of 1993 (Pub. L. No. 103-94, 107 Stat. 1001) which added a policy statement to define the contours of the First Amendment: "It is the policy of the Congress that employees should be encouraged to exercise fully, freely, and without fear of penalty or reprisal, and to the extent not expressly prohibited by law, their right to participate or to refrain from participating in the political processes of the Nation." 5 U.S.C. § 7321 (2000). The very reason for the 1993 Amendments was to address the many conflicting and obscure administrative decisions which "frustrates an ability to ascertain the precise extent of prohibited and protected activities or the penalties involved." S. Rep. No. 103-57 at 5, *reprinted in* U.S.C.A.A.N. 1806 (1993). Congress intended to enhance opportunities for federal employees while off the job, to "take an active part in political management or in political campaigns." *Id.* at 1803.

The Federal Circuit correctly perceived McEntee's plain reading of a plain statute: "McEntee reads the language of § 7322(2) as requiring that a candidate be elected or nominated to represent a major political party." 14a. The Federal Circuit insists, however, that this reading must be rejected

because "elections designated as nonpartisan do not provide a mechanism for parties to chose or identify their representative candidates, [therefore] participation in such elections cannot constitute 'partisan political office.'" 14a. The Albuquerque Charter and Ordinances do not, as the Federal Circuit insists, prohibit anything other than a party label on the ballot. Parties are not restricted from establishing a primary procedure, caucus or election procedure to elect a representative.

Curiously, the Federal Circuit insists that the plain language does not mean that an employee must be nominated or elected to represent the party pursuant to a primary election or selection process in order to violate the Hatch Act: "[t]he term 'nominated or elected as representing a party' does not require a 'formal' party endorsement or selection process; rather insisting the term 'elected as representing a party' is 'broader and imposes no such implication.' In order to give meaning to all the words of the statute, as we must, we do not read the term 'elected as representing a party' to require formal endorsement or selection by a major political party." 15a. Setting aside the facts of the case (since neither McEntee nor anyone else ever claimed McEntee was representing the Republican Party), it is not possible to define "elected as representing a party" in the absence of party process. The Federal Circuit's odd definition of "elected to represent" simply eliminates any need for an endorsement or Party process. More startling, the Federal Circuit's "plain" language analysis also eliminates the statutory language "elected." McEntee was not representing a party, nor was he elected.

The Federal Circuit cited the portion of the statements and writings from the McEntee campaign which, in various forms, fonts, and decibels, noted McEntee's identification as a "conservative Republican," a "Republican," or the "only conservative Republican." A letter to "Dear Republican Friends" was cited as well as "press advisories," one of which announced that present and former Republican legislators would

announce their endorsement of both Republican candidate for mayor, Mike McEntee, at a press conference." A Republican State Senator was quoted, "Republicans need to stand behind the candidate who will stand for the values that Republicans hold dear." Additional letters from former Republican elected officials were noted requesting help for the "only conservative candidate" or similar statements identifying McEntee as a "conservative Republican" or a "Republican." The evidence cited by the Federal Circuit included endorsements from groups with Republican membership.

The Federal Circuit declined to address McEntee's hearsay objections concerning newspaper articles with reporters' conclusions or erroneous quotations of various officials and erroneously implied (A 1102) Republican Party involvement in McEntee's mayoral race. Citing as additional apparent evidence of the unacceptable use of the term Republican, the Federal Circuit identified a draft editorial in McEntee's file which indicated McEntee believes in "conservative values," that he was "open and honest enough to probably call myself a Republican." The Federal Circuit concluded its analysis of the unacceptable evidence of partisanship: "At no time during the campaign did McEntee disavow his Republican identity or refute or refuse the assistance, financial or otherwise, of the Republican Party structure." 5a.[4]

Nothing more clearly establishes the unconstitutional vagueness of the government's actions than the fact that the Federal

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[4] McEntee did deny he represented the Republican Party. McEntee received no assistance from the Republican Party "financial or otherwise." McEntee was not the Republican representative. Moreover, given the Federal Circuit's semi-approval of at least some of McEntee's First Amendment rights ("I am a Republican"), the suggestion that evidence of a Hatch Act violation because McEntee did not "disavow" his "Republican identify" is puzzling. Further, the Federal Circuit's substitution of the undefined Republican Party "structure" for the Republican Party creates additional unacceptable vagueness to the test.

Circuit identified and applied a different test than the OSC and MSPB. The Federal Circuit insists that McEntee's characterization of the prosecution as an application of the *Broering* transformation theory does not "accurately describe the way in which the Hatch Act is enforced" and further insists that McEntee improperly "seized on the OSC's use of the word 'transformed.'" The Federal Circuit's test eviscerates the MSPB's test and the entire basis of the McEntee prosecution, and the Hatch Act test it purports to affirm.[5]

The Federal Circuit's argument that McEntee has improperly characterized the test actually applied by the MSPB or the OSC ignores the numerous references and analysis of the "transformation" evidence and test specifically cited by the MSPB: McEntee "was responsible for the conduct that ultimately transformed the campaign from a nonpartisan to a nonpartisan one." 31a; ". . . the campaign had been transformed into a partisan campaign . . ." 33a; any Hatch Act violation must be based on "analysis of transformation evidence, an unnecessarily fact-specific element that could only be determined conclusively after litigation." 33a; "the Respondent removed the word 'Republican' from materials he distributed after he was contacted by the Special Counsel." *Id.* Thus, in a sense, at least, it can be said that Respondent ceased the activities that had transformed the campaign. *Id.* at 34a. ". . . Respondent's own political activities that transformed the non-partisan election into a partisan election . . ." 34a; ". . . the Respondent's candidacy was not initially violative of the Act. It only became unlawful later, under the transformation theory set forth in *In re Broering*. . . ." 35a; ". . . the only reported case issued by the Board involving a

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[5] Although the test identified by the Federal Circuit has some advantage over the transformation analysis employed by the OSC and MSPB, it was the MSPB's transformation analysis that formed the basis of the prosecution of McEntee, not the Federal Circuit's "acting in concert with the party structure" test.

federal employee and the transformation theory set forth in *Broering* . . ." 35a; "Two other transformation cases involved. . . in *Special Counsel v. Yoho* . . . the Board determined that a state employee violated the Hatch Act under the transformation theory . . ." 35a.

The Federal Circuit certainly does substitute a new test and analysis for the MSPB's "transformation" test. But neither the MSPB nor the Federal Circuit test can be reasonably discerned from the statute. The proposition that the test and criteria whereby a nonpartisan office is "transformed" or "rebutted" is something that is known to persons of common intelligence is not correct: the different tests and the criteria cited by the MSPB and Federal Circuit, and the inability of the FAA ethics experts in Albuquerque or Forth Worth to point to any knowledge of either the "transformation theory" or the newly-created prohibitions against "acting in concert" with a major political party establish the void for vagueness problem.

The Federal Circuit rejected any application of *Republican Party v. White*, 536 U.S. 765 (2002) as well as McEntee's void for vagueness and overbreadth claims. 21a-23a. Though the appellate court eventually admits it cannot identify a "bright-line" rule for a "level of political speech and conduct, on the part of either the candidate or the party, that is necessary to establish representation of a major political party," the Federal Circuit nonetheless insists the statute gives a fair warning of what the law intends to do if that "certain line" is passed. 24a. The appellate court finds no serious constitutional issues because the speech and conduct being prohibited, chilled and regulated in McEntee, do not constitute a "real and substantial threat to protected expression such that a substantial amount of legitimate speech will be chilled. The *only* speech at issue here is that of federal employees serving as candidates for elected office." (Italics added) 22a. Without reference to or reconciling the MSPB opinion citing the

unacceptable use and elimination of the word "Republican" (34a), the very word McEntee used, the Federal Circuit insists: "The statute does not prohibit the bare speech with which McEntee is concerned. An employee-candidate is not barred from identifying his political philosophy 'as standing for the principles of the Republican Party' or stating his party status 'I am a Republican.'" The Federal Circuit opinion references no evidence whereby the OSC or MSPB has approved such statements by McEntee or others, and the Federal Circuit opinion does not reconcile this approved "political speech" with the evidence of the same unacceptable political speech cited in its own opinion. 2a-4a.

The Federal Circuit, after citing the articles as support for its affirmation of a Hatch Act violation, does not address McEntee's hearsay objections concerning newspaper articles concluding there was "ample evidence in the record supporting the Board's determination that the presumption of nonpartisanship was rebutted without relying on the challenged newspaper articles. . . ." 25a. Finally, the "ample evidence" is that "leaders [not the Republican Party or even the Republican Party "structure"] of the local and state Republican Party actively supported McEntee by publicly associating themselves with his campaign, advocating his election and hoping to raise funds in support of his candidacy." 26a.

Finally, the appellate court could not identify any bright-line rule for the level of core political speech and associations it will allow, but suggests possible leniency in the future, if the facts support a conclusion of "less blatant invocation of party status." 25a. Ultimately, the appellate court cites the "combination of McEntee's conduct and the Republican Party's failure to object" as additional criteria that might turn a nonpartisan office into a partisan political office. 25a.

B. Reasons For Granting The Petition

McEntee's First Amendment rights were violated and impermissibly "chilled." The Federal Circuit's opinion is contrary to this Court's holding in *Republican Party v. White*, 536 U.S. 765 (2002). Moreover, the opinion conflicts with basic Hatch Act law. This Court's Hatch Act pronouncements in *Broadrick v. Oklahoma*, 413 U.S. 601 and *United States Civil Service Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 556 (1973) do not compel the Federal Circuit's opinion. While neither *Broaderick* nor *Letter Carriers* address nonpartisan office, the Broering transformation theory, or restrictions concerned with "acting in concert with the Republican Party structure," the Federal Circuit's opinion ignores the legal analysis set forth in those cases. Finally, both the transformation test proposed by the OSC and MSPB, and the "acting in concert" test of the Federal Circuit are unconstitutionally vague and overbroad.

1. The Opinion is Contrary to *Republican Party v. White.*

The Federal Circuit opinion is not supported by existing precedent of this Court in *Republican Party v. White*, 536 U.S. 765 (2002). The government ignored basic void for vagueness and overbreadth jurisprudence. The Federal Circuit's opinion conflicts with basic Hatch Act law. Hatch Act restrictions are narrowly construed and First Amendment rights are broadly construed. *Biller v. United States MSPB*, 863 F.2d 1079, 1087 (2nd Cir. 1988); *Bauers v. Cornett*, 865 F.2d 1517, 1524 (8th Cir. 1989). This Court's Hatch Act pronouncements (*Broadrick v. Oklahoma*, 413 U.S. 601 and *United States Civil Service Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 556 (1973)) do not address nonpartisan offices, the *Broering* transformation theory, or restrictions concerned with "acting in concert with the Republican Party structure."

The Federal Circuit's opinion cannot be reconciled with this Court's decision in *Republican Party v. White*, 536 U.S. 765 (2002). *White* concerned a state canon of judicial conduct that prohibited candidates for judicial office from announcing their views on disputed legal or political issues. *Id.* at 768. Because the canon prohibited speech on its content and burdened the core category of protected speech, this Court applied strict scrutiny to assess its constitutionality. *Id.* at 774. This Court struck down the canon on the ground that it was not narrowly tailored to achieve the compelling state interest of ensuring the impartiality of the state judiciary. *Id.* at 780. As in *White*, in this case, the government is enforcing its interpretation of the Hatch Act against McEntee to prohibit speech based on its content and thus burdens the same core category of protected speech. To prevail against McEntee, the government must avoid a strict scrutiny analysis because it has no evidence that restricting purely political speech by an employee campaigning for a nonpartisan office creates any harm, or that the restrictions are narrowly tailored. Under the strict scrutiny test, the government has the burden of proving the clause is narrowly tailored to serve a compelling state interest. To do so requires a showing that it does not unnecessarily circumscribe protected expression. *White* at 774-775.

The Federal Circuit eliminates the problem of applying strict scrutiny to McEntee's case by suggesting that the canon in *White* was "targeted at restricting protected speech" whereas the statute and the *Broering* transformation theory are "not targeted at restricting political speech." *White* at 22, n. 7. Such a distinction is without reason or support. The same concerns to ensure the impartiality of the state judiciary in *White* are at work in the efforts to ensure the impartiality of the federal workforce. Therefore, the First Amendment subjects the government to the same heightened degree of scrutiny in this case as in *White*. The idea that government can prohibit the core category of protected speech based on its

content and escape a strict scrutiny analysis cannot turn on whether the government's intentions are perceived to be "good" or whether the restrictions directly or "indirectly" target protected speech.

2. The Opinion Conflicts with Basic Hatch Act Law.

In addition to misreading *White*, the Federal Circuit opinion ignores the plain language of the statute. Indeed, Congress has not only allowed participation in nonpartisan races but has encouraged participation to the fullest extent possible. The government may not, therefore, prohibit McEntee or others from stating, stating loudly, or even "trumpeting"[6] that Mike McEntee is a Republican or conservative Republican. The government may not prohibit elected Republicans or former office holders from endorsing or associating with McEntee. The lesson of *White* is not that strict scrutiny applies to governmental actions that directly "target" political speech, but rather that if the government allows participation in elections for judicial or nonpartisan offices, any restriction must pass strict scrutiny because the greater power to prohibit elections entirely does not include the lesser power to prevent "candidates from discussing what the elections are about" or to conduct elections "under conditions of state-imposed voter ignorance." *White* at 788.

Congress commanded that the government must fully and freely encourage McEntee's participation in any campaign for a nonpartisan office, and in doing so, the government has no ability to burden core political speech, particularly by em-

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[6] Sanctions cannot rest upon government offense at how many times the terms are used. *Blaylock v. MSPB*, 851 F.2d 1348, 1355 (11th Cir. 1988). The First Amendment means little if it permits the government to "allow a speaker in a public hall to express his views while denying him the use of an amplifying system." *FEC v. National Conservative Political Action Committee*, 470 U.S. 480, 493 (1985).

ploying shifting and unknown measurements and methodologies after the election. Strict scrutiny is certainly appropriate if the government attempts to measure acceptable levels of political speech or partisanship. *Id.* Under strict scrutiny, the government speech restrictions must also be narrowly tailored to address a compelling government interest. *White* at 780. *See also United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 812 (2000). No compelling government interest is served by government investigation and a post-election measurement to limit "too-partisan" campaigns for nonpartisan office.

3. The Opinion Conflicts With This Court's Prior Hatch Act Decisions.

The primary rationale to support the interests of the government in the Hatch Act are impartiality and fairness in administering the law. *See United States Civil Service Comm'n v. Letter Carriers*, 413 U.S. 548, 564-565 (1973). McEntee is not a high-level supervisor and if he had been elected, he would have had to resign from the FAA position because the mayor's job of Albuquerque is a full-time position. Neither during the campaign nor after his possible election could McEntee cause any such concerns. To the contrary, McEntee's efforts improved the FAA and the public debate. A 1108-1110; 1380.

Nonpartisan offices are simply different from partisan offices and do not provide any clear or compelling reasons for any restrictions:

> Since some of those [Hatch Act] dangers appear to be absent in a non-partisan context, and since those that are present appear to be less destructive of good government and the political process, the state's interest in grossly limiting the activity of its employees in such cases is accordingly diminished, and is therefore something less than compelling. This Court recognizes that there may be instances where the state's interest in curtailing even

> the non-partisan political activities of its employees may be compelling. Nevertheless . . . a regulation is invalid when there are "less drastic means" by which a statute restricting First Amendment rights could achieve its legitimate goal. . . . Thus, while a municipality could conceivably argue that it had a compelling interest in limiting even the non-partisan political activities . . . or in requiring its employees to take a leave of absence, a broadly-worded provision, like the one presently before this Court which requires resignation rather than leave of absence before running for office, would clearly not constitute less drastic means.

Magill v. Lynch, 400 F. Supp. 84, 90 (D.R.I. 1975), *vacated* by *Magill v. Lynch*, 560 F.2d 22 (1st Cir. 1977). *See also Mancuso v. Taft*, 476 F.2d 187, 198-200 (1st Cir. 1973). While the Federal Circuit insists that this Court's decisions in *Mitchell* and *Letter Carriers* "clearly precludes an attack on the act," existing precedent has little to do with investigating, measuring and prohibiting speech in a campaign for a non-partisan office, pursuant to a transformation theory:

> In *Letter Carriers* and *Broadrick* the statutes involved either as written or as construed (citations omitted) proscribed only partisan activities. The Court, therefore, was not called upon to deal with the constitutionality of efforts to limit or prohibit political activity in elections which could be called nonpartisan, and indeed painstakingly and almost without exception confined its strictures to "partisan" elections.

Magill v. Lynch, 560 F.2d 22, 27 (1st Cir. 1977); *see also Mancuso v. Taft*, 476 F. 2d 187, 200 (1st Cir. 1973). *Letter Carriers* and *Broadrick* do not apply to this case. The application of the Hatch Act to nonpartisan activities is a constitutional question the courts have avoided for fifty years. *Bauers v. Cornett*, 865 F.2d 1517, 1518 (8th Cir. 1989). Although some Hatch Act restrictions are clear, " . . . others are pregnant with ambiguity . . . [such as] permission to take

an active part in a nonpartisan election. . . ." *United States Civil Service Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 596 (1973) (Justices Douglas, Brennan and Marshall *dissenting*).

Broadrick and *Letter Carriers* are of no help to the government in restricting McEntee's core political speech. To allow the government to be the arbiter of how much political speech is acceptable is anathema. Under the First Amendment, the government does not have the expertise, wisdom, or license to divine the magic point at which acceptable political speech becomes unacceptable and subjects a federal employee to termination or suspension:

> The role that elected officials play in our society makes it all the more imperative that they be allowed freely to express themselves on matters of current public importance. *Wood v. Georgia*, 370 U.S. 375, 395 (1962). "It is simply not the function of government to select which issues are worth discussing or debating in the course of a political campaign." *Brown*, 456 U.S. at 60 (internal quotation marks omitted). We have never allowed the government to prohibit candidates from communicating relevant information to voters during an election.

Republican Party v. White, 536 U.S. 765, 781-782 (2002). Political speech of candidates is at the heart of the First Amendment and direct restrictions on the content of a candidate's speech are simply beyond the power of government to impose. *White* at 793. (Kennedy, J. *concurring* in the judgment.)

4. Void for Vagueness

A challenge to a statute based upon vagueness grounds requires consideration of whether the statute is sufficiently clear so as not to cause persons "of common intelligence necessarily [to] guess at its meaning and [to] differ as to its application." *United States v. Wunsch*, 84 F.3d 1110, 1119 (9th Cir. 1996) (quoting *Connally v. General Constr. Co.*, 269

U.S. 385, 391 (1926)). Vagueness causes three main problems: "(1) people are punished for behavior that they could not have known was illegal; (2) subjective enforcement of the laws based on 'arbitrary and discriminatory enforcement' by government officers; and (3) chilling effect on the exercise of First Amendment freedoms. *Foti v. City of Menlo Park*, 146 F.3d 629, 638 (9th Cir. 1998). Moreover, "The requirement of clarity is enhanced . . . when the statute abuts upon sensitive areas of basic First Amendment freedoms." *Information Providers' Coalition for Defense of First Amendment v. FCC*, 928 F.2d 866, 874 (9th Cir. 1991). Even though the FAA Hatch Act experts could not locate any prohibition and the OSC and the MSPB would prohibit any statement ("I am a Republican") (34a, 36a) the Federal Circuit propounded a different test to establish a Hatch Act violation:

> We hold that while an employee-candidate in a presumptively nonpartisan election may independently assert a party affiliation once the candidate and the party act in concert with each other, a representative relationship may be established sufficient to rebut the presumption of partisanship. Interpreted in this manner, the amended statute puts an employee on notice that, when serving as a candidate for nonpartisan public office, he is prohibited from engaging in speech and conduct that indicate he is acting in concert with a major political party. 23a.

The Federal Circuit's test is unconstitutional because it violates all three principles of the void for vagueness constitutional limitation. Both the transformation theory and the Federal Circuit's "acting in concern with the Party structure" tests cannot avoid punishing people for behavior that they could not have known was illegal. Neither McEntee nor the FAA Hatch Act counsel had any ability to discern what conduct the government would find illegal.

Government may not "empower its licensing officials to roam essentially at will, dispensing or withholding permission to speak, assemble, picket, or parade, according to their own

opinions regarding the potential effect of the activity . . ." *Shuttlesworth v. Birmingham*, 394 U.S. 147, 153 (1969). In addition to the clear violation of McEntee's substantive First Amendment rights, the government's efforts are remarkable for their complete failure to respond to repeated requests for guidance about the "line" between: (1) acceptable speech to be "fully" encouraged (prior to the transformation of a nonpartisan race); and (2) unacceptable speech that subjects an employee to termination (after the transformation).

The difficulty in identifying the transformation is obvious: the MSPB essentially recognized the chimerical nature of the whole transformation analysis, because the transformation determination is "necessarily, a fact-specific element that could only be determined conclusively after litigation." 33a.

While the government is obligated by statute to encourage employees such as McEntee in races for nonpartisan offices, to exercise their rights, fully and freely, to participate except where specifically prohibited by law (5 U.S.C. § 7321), the point at which this encouragement ends and an action to terminate an employee can begin, is a secret and not something contained in a regulation, rule, guideline or existing precedent. The MSPB suggests the "Respondent stepped over the line that might distinguish mere philosophical rhetoric from prohibited political partisanship." But multiple requests for guidance with respect to the location of that "line" in the form of rules, regulations, guidelines or precedent were ignored. The MSPB concluded and the Federal Circuit affirmed that federal employees need not have reasonable guidance in advance, but should be content with a post-election analysis. 33a.

It is far from clear what standard the OSC or the MSPB employed to come to the conclusion that McEntee's political speech transformed a nonpartisan office into a partisan political office. The lack of regulations, rules or guidelines, particularly concerning political speech, a matter which impinges

so clearly on First Amendment rights, establishes the government's case as unconstitutional. No "standard" to judge acceptable political speech exists. "[A] law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective and definite standards to guide the licensing authority is unconstitutional." *Shuttlesworth v. Birmingham,* 394 U.S. 147, 150-151 (1969).

The transformation theory provides no reasonable opportunity for a person of any level of intelligence to know what conduct is prohibited. *See, e.g., Grayned v. City of Rockford,* 408 U.S. 104, 108 (1972); *Spargo v. New York State Comm'n on Judicial Conduct*, 244 F. Supp. 2d 72, 90 (N.D.N.Y. 2003) (*vacated, remanded on other grounds* at 351 F.3d 65 (2nd Cir. 2003), *cert. denied*, 541 U.S. 108 (2004)) ("There is no objective standard upon which to evaluate what conduct violates the provision, or, for that matter, what conduct is sufficient to meet its directive of upholding integrity and independence.") The OSC's theories of liability constituted a moving target (A 597-600; A 580-586).

The Federal Circuit's theory of liability is just as murky. How may a candidate exercise First Amendment rights to political speech and association but not "act in concert" with the "party structure"? The Federal Circuit initially acknowledges, as it must, that its test identifies "no bright line rule for the level of political speech and conduct, on the part of either the candidate or the party that is necessary to establish representation of major political party." 25a. The Federal Circuit concludes that McEntee "has not established that the amended Hatch Act fails to "provide persons of ordinary intelligence a reasonable opportunity to know what is prohibited." 25a. Indeed, the entire theory whereby employees are terminated for injecting an unacceptable level of partisanship into a campaign for a nonpartisan office is so obscure and vague, it was completely unknown to the Hatch Act experts employed by the FAA.

But the Federal Circuit opinion suggests without citation or explanation that a fair warning exists as to what the law intends to do if a "certain line" is passed. 22a-23a. But undercutting the entire basis of the MSPB's theory of unacceptable activities, the Federal Circuit insists an employee-candidate "is not barred from identifying his political philosophy, 'I stand for the principles of the Republican Party,' or stating a party status, 'I am a Republican.'" 24a. But the MSPB never suggests such statements are acceptable under any circumstance. If the "certain line" is understandable to any common person, how did the MSPB and OSC miss it? If this certain line is understandable to the common person, how can the FAA Ethics Counselors responsible for Hatch Act interpretation, and the FAA Regional Counselor, be unaware of the existence of any line?

Ironically, while stating clearly for the first time that statements that might be made by McEntee that he is a "Republican" are not grounds for Hatch Act termination proceedings, and while suggesting that the test should consider acts "in concert with a political party," the evidence the Federal Circuit ultimately used to support the claimed Hatch Act violation is the same core political speech ("I am a Republican"), not evidence of "acting in concert with a political party." The Federal Circuit concludes that McEntee: "1) Openly solicited members of the Republican Party for campaign contributions . . ."; "2) Made it clear he was requesting donations on the basis of party affiliation in order to further the Party's agenda." Is it the request of donations from Republicans or the suggestion that he will pursue lower taxes or less government that violates the Hatch Act? "3) He trumpeted his endorsement by the Executive Committee of the Bernalillo County Republican Party." Assuming a "trumpeting," is it the endorsement by this group that lacks any formal party status or function that violates the Hatch Act? "4) He trumpeted his endorsement by . . . individual Republican Party figures . . ." Is it the "trumpeting" of the endorse-

ment of individual Republican Party figures that establishes McEntee is "acting in concert" with the Republican Party? "5) He . . . appeared at press conferences with his endorsers." Acknowledging that many of McEntee's "endorsers" were Republicans, or even "individual Republican Party figures," this too cannot be conflated to "acting in concert with the Republican Party." "6) Further, leaders of the local and state Republican Party" actively supported McEntee by publicly associating themselves with his campaign. Can the Hatch Act possibly prohibit leaders of the local and state Republican Party from actively supporting McEntee by publicly associating themselves with his campaign, advocating his election or helping to raise funds in support o his candidacy?

Not only does the Federal Circuit fail to establish any reasonable link between these activities, McEntee and persons supporting McEntee to the stated test of a employee acting in concert with a political party, but the Federal Circuit's conclusion that a "less blatant indication of party status may not justify rebutting the presumption of nonpartisanship" establishes the lack of any guidance to allow, on one hand, an understanding of what is prohibited and subjects an employee to termination, and, on the other hand, what activities the government must encourage "fully, freely, and to the greatest extent possible, unless expressly prohibited by law."

In short, the Federal Circuit test allowing significant sanctions, including termination, for a federal employee who engages "in speech and conduct that indicate he is acting in concert with a major political party" (*Id.* at 24) does not provide persons of ordinary intelligence a reasonable opportunity to know what is prohibited, and it is therefore unconstitutionally vague.

Finally, the MSPB provides the quintessential elements of the "void for vagueness" criteria in finding that McEntee had

crossed the line between acceptable philosophical speech and an unacceptable partisan pitch:

> Alas, he [McEntee] would have had a stronger case had he stopped after simply identifying himself as conservative, a less loaded description that the one he used and one that would not necessary connote a political party. . . . Respondent stepped over the line that might distinguish mere philosophical rhetoric from prohibited political partisanship. 48a.

5. Overbreadth

> Laws that trench on that area [First Amendment rights] must be narrowly and precisely drawn to deal with precise ends. Overbreadth in the area of the First Amendment has a peculiar evil, the evil of creating chilling effects which deter the exercise of these freedoms.

United States Civil Service Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548, 598 (1973) (Justices Douglas, Brennan and Marshall, *dissenting*). Although some of the Hatch Act restrictions are clear, "others are pregnant with ambiguity . . . [such as permission] to take an active part . . . in a nonpartisan election. . . ." *Id.* at 596. Under the Federal Circuit's test, is McEntee allowed to associate with Republicans or groups that include Republican members? Apparently, some of the impermissible associations included Republican legislators who endorsed McEntee, or groups with Republican memberships including the Lincoln Caucus and Republican Assembly. If the government's investigation and measurement of the "Republicanness" of various groups such as the Lincoln Caucus, Republican Assembly, and the New Mexico Right-to-Life does not establish overbreadth and the actual abuse, the OSC's demand that McEntee, his representatives, agents and attorneys summarize their conversations with each and every one of the more than 130,000 Bernalillo County Republicans should be considered. The Federal Circuit opinion itself suggests overbreadth issues and specifi-

cally excludes "the question of whether or not the conduct of another candidate in a nonpartisan election could affect the entitlement of the federal employee candidate to participate. That question is not before us." 18a, n. 4.

Does the Federal Circuit's test allow McEntee to associate with Republicans or groups that include Republican members? Can a newspaper reporter force McEntee out of the race just by listing McEntee's political registration in an article? Can an opponent force McEntee out of the race by mentioning in debate that several prominent party officials support McEntee? And what of the government's investigation of the Republican membership of the groups (such as the Lincoln Caucus, Republican Assembly and New Mexico Right to Life) endorsing McEntee? How can this be a proper subject for governmental investigation and measurement? The government is out-of-bounds in this case, because no bounds can be discerned.

Under the overbreadth doctrine, a showing that a law punishes a "substantial" amount of protected free speech judged in relation to the statute's plainly legitimate sweep (*Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)) "suffices to invalidate all enforcement of that law, until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression." *Virginia v. Hicks*, 539 U.S. 113, 118-119 (2003).

Without knowing or being able to describe in advance what transforms a campaign for a nonpartisan political office into a campaign for a partisan political office, the government in this case went on a far-reaching search for evidence of the use of the word "Republican" and party affiliation and used whatever could be found or inferred, whether it was protected political speech or protected rights of association, to suggest the transformation of a nonpartisan election. It is not surprising that the OSC found some supporters of McEntee, or McEntee himself, to be affiliated with a party. No precedent,

rules, regulations or guidelines exist for the government to investigate, measure and determine the tolerable and intolerable levels of references to "Republican" ideas, ideals or the partisan party, in a nonpartisan race.

The government has chilled and violated McEntee's First Amendment rights. The MSPB endorsed and cited with approval the OSC's efforts to require McEntee to remove the word "Republican" from his campaign. 34a. The MSPB finds a violation in McEntee's "repeatedly describing himself as a 'conservative Republican' during campaign events." 46a. The Federal Circuit cites essentially the same offenses as evidence of "acting in concert with a party 'structure.'" Both the MSPB's transformation theory and the Federal Circuit's "acting in concert with party structure" tests establish that protected speech "I am a Republican" is impermissibly constrained.

CONCLUSION

The government's Hatch Act interpretation and prosecution has chilled Mike McEntee's First Amendment rights to freedom of speech and association. It has also unconstitutionally restricted the rights of association of "Republican leaders" and other supporters of Mike McEntee. Even if such burdens on Freedom of Speech and Association were justified, they are not narrowly drawn or supported by a compelling government interest. The government simply has no legitimate interest or license to investigate, measure and dole out permission to speak or associate in a campaign for a nonpartisan office.

The Court of Appeals has erred under precedents of this Court, in upholding the government's "line" separating acceptable from unacceptable core political speech in a federal employee's campaign for a nonpartisan office. Review by this Court is appropriate to reverse the errors of the Court of Appeals.

This Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

[Filed April 15, 2005]

04-3066

MIKE MCENTEE,

Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,

Respondent.

OPINION

GAJARSA, *Circuit Judge*.

Mike McEntee appeals from a decision by the Merit Systems Protection Board (the "Board" or "MSPB") granting summary judgment that he had committed violations of the *Hatch Act* in the conduct of his campaign for Mayor of Albuquerque, New Mexico. *Special Counsel v. McEntee*, 2003 MSPB LEX1S 560, CB-1216-02-0007-T-1 (MSPB Sept. 8, 2003). The Hatch Act[1] is the colloquial designation for the federal statute that prohibits covered government employees from engaging in certain partisan political activities. *See* generally 5 U.S.C. §§ 7321-7326 (2000), Because we discern no legal error in the Board's decision and it was supported by substantial evidence, we affirm.

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[1] The name "Hatch Act" initially referred to Senate Bill 1871 introduced by Senator Carl Hatch, enacted as chapter 410, 53 Stat. 1147 (1939) and originally codified as 18 U.S.C. § 601. As used here, the terms "Hatch Act" or "Act" refer not to a particular bill, but to the body of federal statutes and regulations restricting the political activities of federal employees.

I. BACKGROUND

In August 2001, McEntee declared himself a candidate for Mayor of Albuquerque, New Mexico. According to city ordinances, the mayoral race is intended to be nonpartisan and the names of the candidates are listed on the ballot without party or other designation. At the time he became a candidate, McEntee was employed as an air traffic control specialist with the Federal Aviation Administration ("FAA"), a position he obtained in 1982. Prior to declaring his candidacy, McEntee consulted with the Albuquerque FAA Ethics Counselor regarding restrictions imposed by the Hatch Act. When asked prior to the onset of the campaign, both the Albuquerque FAA Ethics Counselor and FAA's regional counsel determined that the Hatch Act did not prevent McEntee from being a candidate.

In support of McEntee's quest for the mayoral seat, his campaign distributed a variety of leaflets and other literature. A campaign checking account was established under the name "Friends for Mike McEntee," which paid for the printing and distribution costs of those materials. McEntee approved for distribution all of the campaign literature at issue.

The McEntee campaign distributed leaflets stating "Mike McEntee—the ONLY CONSERVATIVE REPUBLICAN in the race for Mayor."[2] The same leaflet included the statement "finally, Republicans have a chance to elect a Conservative to lead our city "and the following quote from "Former Republican State Representative Frank Bird:"

> For years Republicans have been forced to hold their nose and accept the policies that city government forced on them by Jim Baca, Marty Chavez and the rest of the liberal Democrats. Now, for the first time in years we

[2] All of the emphasis that appears in the cited quotations from McEntee's campaign literature is original.

> have a chance to elect one of us, a conservative Republican to clean up the mess in City Hall.

Two additional leaflets also described McEntee as "The ONLY Conservative Republican!"

The campaign also distributed a "Dear Friend" letter from Jack Stahl, "Former Republican Lieutenant Governor," which included the following statements:

> In two months, we can FINALLY elect a REPUBLICAN MAYOR to lead this city!
>
> As Republicans, we know that this is the first time in years—and probably the last time in even more years—that we have a chance to elect a Republican Mayor to bring conservative values and principles to City Hall.
>
> IF REPUBLICANS UNITE BEHIND THE ONLY CONSERVATIVE REPUBLICAN, MIKE McENTEE .... WE WIN!
>
> We Republicans can turn Albuquerque into a great city, but we need your help twice. First; WE NEED YOUR VOTE, Second; We need your financial support now so Mike McEntee can put his Conservative Republican message in the mail, on TV and on radio.
>
> Our city is crying out for new REPUBLICAN leadership.
>
> WE REPUBLICANS CAN MAKE A DIFFERENCE!

The letter further listed McEntee's opponents, all identified as "Democrat."

McEntee's campaign also disseminated a "Dear Republican Friend" letter that stated:

> One reason I am writing you is because you are a registered Republican. . . . This is not supposed to be a "partisan" election, but we all know Mayor Baca and

> former Mayor Marty Chavez are cut from the same mold! As Republicans, we are outnumbered in Albuquerque. Our only hope of defeating the Democrat machine is to stick together behind one candidate. At last count there were at least 10 candidates saying they were running for Mayor, most of them Democrats like Baca and Chavez.

Another leaflet invited Albuquerque's kids to "take a shot at wasted spending at our Dunk the Dems tank," as part of an event sponsored by the McEntee campaign.

The McEntee campaign also issued press advisories, one of which announced that "Former Congressman Bill Redmond joined with 10 Republican legislators and grassroots Republican leaders to announce their endorsement of Republican candidate for Mayor, Mike McEntee, at a press conference on Wednesday, August 22, 2001." McEntee was present at the referenced press conference. The same press advisory included this quote from Senator Mark Boitano: "Republicans need to stand behind the candidate who will stand for the values that Republicans hold dear."

In addition to the endorsements of individual Republicans, McEntee also received endorsements from the Executive Committee of the Bernalillo County Republican Party, the Republican Assembly and the Republican Lincoln Caucus. McEntee trumpeted these endorsements in the press advisory discussed above.

The McEntee campaign solicited campaign contributions in a variety of ways. The "Dear Friend" letter from "Former Republican Lieutenant Governor" Jack Stahl included the statements "I'VE JUST SENT MY CHECK TO MIKE MCENTEE. WON'T YOU PLEASE SEND YOUR CHECK TODAY? . . . You [sic] contribution of $ 25, $ 50, $ 100 or even $ 1000 is vital. Please let us know in the next 10 days if you can help elect the only conservative candidate." Simi-

larly, the Dear Republican Friend told recipients that "if you can afford a small contribution to help us offset the cost of this mailing and to help us build a warchest for the battle with Baca and Chavez down the road, we would appreciate it." Other campaign literature also included solicitations as did the campaign website. At least two fundraising events were held in support of the McEntee campaign, one on June 21, 2001, and another on September 14, 2001.

The local press reported on the Republican partisanship of the McEntee campaign. An article in the Albuquerque Journal chronicled McEntee's endorsement by the Bernalillo County Republican Executive Committee under the headline "County GOP Back McEntee for Mayor." A similar article in the Albuquerque Tribune, dated August 23, 2001, was entitled "Party Time? Open Republican endorsement stirs up supposedly nonpartisan election." The "Party Time" article included statements from the State Republican Party Chairman indicating that "the county GOP's actions take the 'cloak off claims that party politics don't control city government." The article included the observation that "McEntee, whose campaign has struggled to catch fire, is eagerly wrapping himself in the Republican flag." Finally, another article in the Albuquerque Journal, entitled "GOP Radar Focuses on McEntee," stated that "as the sun set on his fundraiser, McEntee stepped to the microphone and stayed true to form. His message was simple: We need a Republican on the 11th floor." The McEntee campaign responded to the press coverage in part by circulating an editorial under McEntee's name stating that "the Journal is irate because I believe in the conservative values embraced by Republicans and am open and honest enough to proudly call myself a Republican." At no time during the campaign did McEntee disavow his Republican identity or refute or refuse the assistance, financial or otherwise, of the Republican Party structure.

On August 30, 2001, Amber Bell, an attorney with the Office of Special Counsel ("OSC"), informed McEntee that the OSC believed that his candidacy for Mayor violated the Hatch Act. Bell offered McEntee the option of resigning his candidacy or resigning his federal position. McEntee answered that he did not believe his candidacy was unlawful. In a letter dated August 31, 2001, William Reukauf, Associate Special Counsel with the OSC, reiterated the message of Bell's conversation and notified McEntee that partisan politics had entered his campaign and therefore his candidacy for Mayor of Albuquerque violated the Hatch Act. Specifically, Reukauf determined that the presumption that the Albuquerque Mayoral election is nonpartisan was rebutted by McEntee's endorsement by the "Bernalillo County Republican Party" and his advertisement of that endorsement. Reukaufs letter permitted McEntee to correct his violation by either publicly withdrawing from the election or resigning his federal position by September 7, 2001.

McEntee, through counsel, responded in writing to Reukaufs letter. McEntee's response challenged Reukaufs statement that McEntee had been endorsed by the Bernalillo County Republican Party on the grounds that McEntee was endorsed only by a small committee of Republicans, which did not have the authority to issue an endorsement on behalf of the entire party. McEntee asserted that because he had not received the endorsement of a state or national political party the election had not been transformed into a partisan political race. McEntee chose not to withdraw from the race and did not resign his position with the FAA. The election was held October 2, 2001 and McEntee was not elected.

On November 20, 2001, OSC filed a complaint with the Merit Systems Protection Board charging McEntee with being a candidate for election to partisan political office in violation of § 7323(a)(3) of the Hatch Act and its implementing regulations. *See* 5 U.S.C. 7323(a)(3) (2000); 5 C.F.R.

§ 734.304 (2004). The OSC also charged McEntee with knowingly soliciting, accepting, or receiving political contributions in violation of § 7323(a)(2) of the Hatch Act and its implementing regulations. *See* 5 U.S.C. § 7323(a)(2) (2000); 5 C.F.R. § 734.303 (2004). As a penalty for his violations, OSC asked that McEntee be removed from his position with the FAA.

The parties agreed to bifurcate the proceedings into liability and penalty determinations. In its Order Granting Summary Judgment, the Board determined that party politics had entered the presumptively nonpartisan election for Mayor of Albuquerque and that McEntee's activities in that election violated the Hatch Act as alleged. In a separate Recommended Decision, the Board determined that the appropriate penalty for McEntee's violations was that he be suspended from his position with the FAA for a period of 120 days.

McEntee filed a timely appeal challenging only the Board's decision that he had committed violations of the Hatch Act. This court has jurisdiction pursuant to 28 US.0 § 1295(a)(9).

II. DISCUSSION

The scope of our review in an appeal from a decision of the Board is limited. The Board's decision must be affirmed unless it was: "(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence." 5 U.S.C. § 7703(c) (2000); *Briggs v. MSPB*, 331 F.3d 1307, 1311 (Fed. Cir. 2003). McEntee alleges that the Board's decision is not in accordance with law because it does not comport with the current provisions of the Hatch Act. He also alleges that the decision is not supported by substantial evidence. We review the Board's determinations of law for correctness without deference to the Board's decision. *King v. Dep't of Navy*, 130 F.3d 1031, 1033 (Fed. Cir. 1997). Sub-

stantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229, 83 L. Ed. 126, 59 S. Ct. 206 (1938).

The Board found that McEntee had engaged in two forms of conduct prohibited by the Hatch Act: 1) running as a candidate for election to a partisan political office in violation of 5 U.S.C. § 7323(a)(3); and 2) knowingly soliciting and receiving a political contribution in violation of 5 U.S.C. § 7323(a)(2). The Board grounded its findings for both violations in its determination that the McEntee campaign introduced partisan politics to the 2001 Albuquerque Mayoral election, effectively rebutting the presumption that the race was not an election for partisan political office.

The longstanding policy of the administrative agencies tasked with enforcing the Hatch Act has been to presume that participation in an election for which state law provides for a nonpartisan ballot is not a prohibited activity. *In re Broering*, 1 P.A.R. 778, 779 (CSC 1955); *see also Special Counsel v. Mahnke*, 54 M.S.P.R. 13 (1992); *Special Counsel v. Seastrunk*, 28 M.S.P.R. 51 (1985); *Special Counsel v. Yoho*, 15 MS.P.R. 409 (1983). Under the precedent of the MSPB, the presumption that an election is nonpartisan could be rebutted by evidence showing that partisan politics actually entered the campaigns of the candidates. Broering, 1 P.A.R. at 779 (presumption that election was nonpartisan rebutted by evidence that respondent readily accepted partisan political support, knew that he was being supported by a partisan political party, and passed out literature indicating that he had the support of a partisan political party); *Mahnke*, 54 M.S.P.R. at 13 (presumption of nonpartisanship was rebutted by appearance of opponent's party designation on the ballot); *Seastrunk*, 28 M.S.P.R. at 51 (presumption of nonpartisanship was rebutted because two candidates opposing respondent appeared as Democrats on the ballot); *Yoho*, 15 M.S.P.R. at

409 (although Democratic and Republican parties remained neutral as to all of the candidates, presumption of nonpartisanship was rebutted when two of the candidates appeared on the ballot with party designations).

In its initial charges against McEntee, the OSC described this process of rebutting the presumption of nonpartisanship as "transforming" the presumptively nonpartisan election into a prohibited contest. McEntee has seized on the OSC's use of the word "transform" and characterizes the rationale articulated by Broering as a "transformation theory," whereby an election in which federal employees are guaranteed the right to participate is changed into a partisan political race. We address below McEntee's assertions regarding the rights afforded federal employees under the Hatch Act, but we note at the outset that "transformation theory" does not accurately describe the way in which the Hatch Act is enforced. The rationale articulated in Broering and its progeny does not operate to "trans form" a protected activity into a prohibited activity, but rather it allows for the presumption of nonpartisanship created by state and local election laws to be rebutted by the actual conduct of an election. Here, Albuquerque city ordinances provide that candidates for mayor shall be listed on the ballot without party or other designation. Accordingly, the Board presumed that the 2001 mayoral election qualified as a nonpartisan election in which McEntee could participate without violating the Hatch Act. The Board determined that the presumption of nonpartisanship was rebutted by overwhelming evidence showing that McEntee's campaign had injected partisan politics into the race.

McEntee alleges that the Board's reliance on evidence of the actual conduct of the election to rebut the presumption of nonpartisanship was improper in light of the passage of the Hatch Act Reform Amendments of 1993, Pub. L. No. 103-94, 107 Stat. 1001 (the "1993 Amendments"). He also charges that the so-called "transformation theory" is unconstitutional

because it violates the *First Amendment*. Finally, McEntee asserts that the Board's determination that the 2001 Albuquerque mayoral race constituted a partisan election was not supported by substantial evidence.

A. The Statutory Language

In order to understand the effect of the 1993 Amendments, it is necessary to first understand the context in which they were adopted. The Hatch Act was initially enacted in 1939 in response to concerns about the harmful effects of political activities by government workers. The Act drew on rules promulgated by the Civil Service Commission that were designed to prevent merit system employees from "using [their] official authority or influence either to coerce the political action of any person or body or to interfere with any election." S. Rep. 103-57 at 2, reprinted in 1993 U.S.C.C.A.N. 1802, 1803 (1993); *see also United States Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 560, 37 L. Ed. 2d 796, 93 S. Ct. 2880 (1973).

The pre-1993 Hatch Act broadly limited the ability of federal employees to engage in certain political activities by prohibiting employees subject to the structure of the Act from taking "an active part in political management or in political campaigns." 5 U.S.C. § 7324(a)(2) (1988). The term "an active part in political management or in political campaigns" was defined in the statute as "those acts of political management or political campaigning which were prohibited on the part of employees in the competitive service before July 19, 1940, by determinations of the Civil Service Commission under the rules prescribed by the President." *Id.*

In the process of upholding the constitutionality of the pre-1993 statute, the Supreme Court limited its reach to the specific prohibitions set out in the regulations promulgated by the Civil Service Commission in 1970. *Letter Carriers*, 413 U.S. at 576. At the time Letter Carriers was decided and until

the passage of the 1993 statutory amendments, the pertinent regulations provided that:

> (a) An employee may not take an active part in political management or in a political campaign, except as permitted by this subpart.
>
> (b) Activities prohibited by paragraph (a) of this section include but are not limited to . . . becoming a partisan candidate for, or campaigning for, an elective public office.

5 C.F.R. § 733.122 (1970). Thus, the interplay of the statute, regulations, and case law established a broad prohibition against covered employees playing an active role in political campaigns, which included a ban on becoming a partisan candidate for public office.

The primary text of the Act remained in its original form until the passage of the 1993 Amendments. The post-1993 Hatch Act expressly prohibits covered employees from *running* "for the nomination or as a candidate for election to a partisan political office." 5 U.S.C. § 7323(a)(3). Furthermore, covered employees may not "knowingly solicit, accept or receive apolitical contribution from any person," subject to certain exceptions not applicable here. *Id.* § 7323(a)(2). The statutory definition of a "political contribution" includes "any gift subscription, loan advance or deposit of money or anything of value, made for any political purpose." *Id.* § 7322(3)(A). The relevant regulations define a "political purpose" as "an objective of promoting or opposing a political party, candidate for partisan political office, or partisan political group." 5 C.F.R. § 734.101 (2004).

The key language in the current statutory structure, as applied by the Board, is the term "partisan political office." The statute defines a "partisan political office" as "any office for which any candidate is nominated or elected as representing a party any of whose candidates for Presidential

elector received votes in the last preceding election at which Presidential electors were selected." 5 U.S.C. § 7322(2) (2000).[3]

In addition to changing the language and substance of the prohibition effected by the Act, the 1993 Amendments added a policy statement to the statute. Section 7321 of the current Hatch Act reads: "It is the policy of the Congress that employees should be encouraged to exercise fully, freely, and without fear of penalty or reprisal, and to the extent not expressly prohibited by law, their right to participate or to refrain from participating in the political processes of the Nation." 5 U.S. C. § 7321 (2000).

The legislative history provides further guidance on the purpose of the 1993 Amendments. The Senate Report issued in conjunction with Senate Bill 185, the bill introducing the 1993 Amendments, questioned the efficacy of the original Act's broad ban on employee partisan political activity and identified two remediable concerns: (1) "the neutrality requirement . . . inhibits Federal employees from exercising their constitutional rights;" and (2) the statute and enforcement scheme are vague "resulting in an inability to ascertain the precise extent of prohibited and protected activities or the penalties involved." S. Rep. No. 103-57 at 5, reprinted in 1993 U.S.C.C.A.N. at 1806 (1993).

In order to address the concerns identified, the 1993 Amendments relaxed the prohibitions of the Hatch Act "to provide for Federal civilian employees to participate voluntarily, as private citizens, in the political processes of the Nation and to protect such employees and the General citizenry from improper political solicitations." S. Rep. No. 103-57 at 1, re-

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[3] For ease of reference, in the remainder of the opinion we use the shorthand term "major political party" in place of the statutory language "a party any of whose candidates for Presidential elector received votes in the last preceding election at which Presidential electors were selected."

printed in 1993 U.S.C.C.A.N. at 1802. As expressly stated in the Senate Report to Senate Bill 185, the amendments were designed to restore to most federal employees the right, while off-the-job, to "take an active part in political management or in political campaigns," while maintaining and strengthening prohibitions on "political activity" while at work. *Id.* at 1803. The amendments also continued "current law prohibitions against running for partisan elective office and against solicitation of potential contributions from the general public." *Id.* In responding to Minority Views issued by opponents to Senate Bill 185, the bill's sponsor, Senator John Glenn, reiterated that, contrary to prior attempts to reform the Hatch Act, his bill did not relax the law prohibiting federal employees from running for partisan elective office. *Id.* at 1838. The explicitly identified purpose of Senate Bill 185 and the statements of the bill's drafter and chief proponent indicate that the changes wrought by the 1993 Amendments were not intended to alter the original Act's restrictions on the ability of employees to serve as candidates in partisan elections. *See Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 203, 47 L. Ed. 2d 668, 96 S. Ct. 1375 (1976) (giving weight to the explanatory statements made by a spokesman for the drafters of a statute).

B. The Viability of the Rebuttable Presumption Analysis

McEntee argues that the application of a rebuttable presumption of nonpartisanship is no longer a viable construct because: (1) the definition of "partisan political office" excludes elections designated as nonpartisan under state or local law; and (2) the policy statement of § 7321 protects the right of federal employees to participate in such elections. McEntee's interpretation of the statute is without merit.

McEntee asserts that elections designated as nonpartisan under state or local law cannot meet the statutory requirements to be considered a "partisan political office." To reach this conclusion, McEntee reads the language of § 7322(2) as requiring that a candidate be elected or nominated to repre-

sent a major political party. Under this theory, because elections designated as nonpartisan do not provide a mechanism for parties to choose or identify their representative candidates, participation in such elections cannot constitute running for a "partisan political office."

We reject McEntee's reading of § 7322(2) on the ground that it is contrary to the plain meaning of the statutory language. Statutory interpretation begins with the language of the statute, the plain meaning of which we derive from its text and its structure. *Norfolk Dredging Co., Inc. v. United States*, 375 F.3d 1106, 1110 (Fed. Cir. 2004). Here, McEntee presumes that the term "nominated or elected" modifies the phrase "as representing a party" thereby creating a requirement that the candidates represent a party by nomination or election. A careful reading of the statute, however, reveals that the phrase "as representing a party" actually modifies the term "nominated or elected" and the entire clause "any candidate is nominated or elected as representing a party" identifies the office sought. Accordingly, the definition of a "partisan political office" expressly encompasses offices for which candidates are either nominated as representing a party or elected as representing a party.

While the term "nominated . . . as representing" a party suggests a formal party endorsement or selection process, the term "elected as representing a party" is broader and imposes no such implication. In order to give meaning to all the words of the statute, as we must, we do not read the term "elected as representing a party" to require formal endorsement or selection by a major political party. *TRW Inc. v. Andrews*, 534 U.S. 19, 31, 151 L. Ed. 2d 339, 122 S. Ct. 441 (2001) (stating that cardinal principles of statutory construction require that statutes be construed so that "no clause, sentence or word shall be superfluous, void, or insignificant" (quoting *Duncan v. Walker*, 533 U.S. 167, 174, 150 L. Ed. 2d 251, 121 S. Ct. 2120 (2001))); *United States v. Menasche*, 348 US. 528, 538-

39, 99 L. Ed. 615, 75 S. Ct. 513 (1955) ("It is our duty to give effect if possible, to every clause and word of a statute." (internal cites omitted)); *Shoshone Indian Tribe of the Wind River Reservation v. United States*, 364 F.3d 1339, 1349 (Fed. Cir. 2004) ("Accepted rules of statutory construction suggest that we should attribute meaning to all of the words in the Act if possible."); *James v. Santella*, 328 F.3d 1374, 1381 (Fed. Cir. 2003) (stating that as a general rule a statute should not be construed in such a way that renders one of its parts inoperative). Thus, the terms of § 7322(2) do not preclude an election designated as nonpartisan under state law from constituting an election for a "partisan political office."

McEntee also asserts that the demise of the rebuttability of the presumption of nonpartisanship is mandated by § 7321. He reads the policy statement articulated in that section to prevent OSC from challenging the participation of federal employees in elections designated as nonpartisan under state or local law. He also contends that the section requires that all activities encompassed by the prohibitions of the Hatch Act be directly addressed in the statute thereby disallowing the application of the judicially-constructed rebuttable presumption analysis.

McEntee's interpretation of § 7321 does not accurately reflect the changes in the statutory scheme effected by the 1993 Amendments. Section 7321 states that "employees should be encouraged to exercise fully, freely, and without fear of penalty or reprisal, and to the extent not expressly prohibited by law, their right to participate or to refrain from participating in the political processes of the Nation." 5 U.S.C. § 7321 (2000). The 1993 addition of, 7321 simply raised what had previously been the articulated policy of the Office of Personnel Management to the level of statute.

Prior to the 1993 Amendments, the regulations implementing the Hatch Act included the statement that "all employees are free to engage in political activity to the widest extent

consistent with the restrictions imposed by law and this subpart." 5 C.F.R. § 733.111(a) (1992). The regulations went on to identify the activities expressly permitted by the Act to include taking "an active part, as a candidate or in support of a candidate, in a nonpartisan election." *Id.* § 733.111(a)(10). According to the pre-amendment statutory definition of "nonpartisan political activity," employees were not prohibited from engaging in "political activity in connection with . . . an election and the preceding campaign if none of the candidates is to be nominated or elected at that election as representing a party any of whose candidates for presidential elector received votes in the last preceding election at which presidential electors were selected." 5 U.S.C. § 7326(1) (1988). It is worth noting that the earlier definition of "nonpartisan political activity," where no candidate could be nominated or elected as representing a major political party, is simply the converse of the definition in the current statute for "partisan political office," which includes elections where any candidate is nominated or elected as representing a major political party. Furthermore, the current regulations continue to define "nonpartisan election" in the exact terms used in the pre-1993 statute. *See* 5 C.F.R. § 734.101 (2004).

Placing the 1993 Amendments in their full legislative context, it is clear that, contrary to McEntee's assertion, the incorporation of § 7321 did not enhance the protection afforded an employee's right to participate in a presumptively nonpartisan election. Such rights were expressly protected under the pre-1993 regulatory scheme and the policy language of § 7321 simply reinforces that employees retain all political rights not expressly prohibited.

McEntee also argues that the phrase "not expressly prohibited by law" found in § 7321 requires that all limitations imposed on employees' political rights be promulgated in the statute. In support of this theory, McEntee attempts to rely on

the legislative history of the amended statute and the regulations implementing it.

The Senate Report issued in conjunction with the reporting of Senate Bill 185 included additional views from four senators opposing the bill as written. As cited by McEntee, those senators stated that they read the language of what is now § 7321 "to state clearly and unequivocally that without an express prohibition stated in statute, the President or agency will lack the necessary authority to provide for additional prohibitions beyond S. 185." S. Rep. No. 103-57 at 41, reprinted in 1993 U.S.C.C.A.N. at 1842. This statement was specifically made not out of concern over the scope of the activities prohibited, but in an effort to exempt certain "sensitive" employees, such as "career senior executive service employees, federal supervisors and managers, and employees of comparable rank and status, from coverage under the bill." *Id.* The amendment that was proposed to address the concerns expressed in the additional views was disapproved by voice vote. S. Rep. No. 103-57 at 9, reprinted in 1993 U.S.C.C.A.N. at 1810. McEntee provides no rationale as to why we should give weight to an interpretation of the statute offered by senators opposing the bill adopted. As the Supreme Court has stated, "the fears and doubts of the opposition are no authoritative guide to the construction of legislation," *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 394, 95 L. Ed. 1035, 71 S. Ct. 745, 60 Ohio Law Abs. 81 (1951), because often "in their zeal to defeat a bill, they understandably tend to overstate its reach." *NLRB v. Fruit Packers*, 377 US. 58, 66, 12 L. Ed. 2d 129, 84 S. Ct. 1063 (1964); *see also Bryan v. United States*, 524 U.S. 184, 196, 141 L. Ed. 2d 197, 118 S. Ct. 1939 (1998). The relevance of the interpretation cited here is further diminished by the recognition that it was offered in response to concerns other than those identified by McEntee and the amendment proposed to address those concerns was rejected. We do not find the cited legislative history persua-

sive authority for interpreting § 7321 to prohibit application of the rebuttable presumption analysis.

McEntee's reliance on 5 C.F.R. § 734.104 is equally unavailing. The cited regulation provides that "no further proscriptions or restrictions may be imposed upon employees covered under this regulation" with certain except ions not relevant here. 5 C.F.R. § 734.104. The rebuttable presumption analysis, however, does not impose an additional proscription or restriction on federal employees. To the contrary, it simply permits enforcing officials to consider the actual conduct of a presumptively nonpartisan election in determining whether any federal employee candidate stood for election in that race "as representing a party." [4] Such an inquiry does not conflict with the provisions of 5 C.F.R. § 734.104, which restricts the government's ability to make illegal activities deemed lawful under the statute and regulations, but does not limit the government's inquiry into determining what constitutes an unlawful activity.

McEntee correctly asserts that the 1993 Amendments relaxed the scope of certain Hatch Act prohibitions and that the current implementing regulations expressly permit an employee to "run as a candidate in a nonpartisan election." *Id.* § 734.207(b). McEntee's argument founders, however, when he attempts to rely on these precepts to insulate from scrutiny his conduct as a candidate for public office. Reduced to its base, McEntee's challenge to the post-1993 vitality of the rebuttable presumption analysis is nothing more than an attempt to limit the definition of "nonpartisan election" to the standards provided by state and local election law. We have previously rejected such invitations to define federal statutory

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[4] Nothing in this opinion should be read as addressing the question of whether the conduct of another candidate in a nonpartisan election could affect the entitlement of a federal employee candidate to participate. That question is not before us.

and regulatory terms solely by reference to state law. *Campbell v. Merit Sys. Prot. Bd.*, 27 F.3d 1560 (Fed. Cir. 1994).

In Campbell, a case decided under the pre-1993 Hatch Act, we interpreted the regulations that permit certain employees to participate in partisan elections as "independent candidates," provided that they reside in municipalities with a majority of the voters employed by the federal government. *Id.* at 1568. In that case, we wisely refused to limit the definition of an "independent candidate" to the strictures of state law, primarily out of concern that "reducing the factual inquiry into 'independence' to an examination of a person's registration card and ballot billing would exalt form over substance and permit circumvention of the substantive congressional policy of keeping partisan politics out of the routine administration of the laws and the running of the bureaucracy." *Id.* Accordingly, we resolved Campbell by considering the facts presented to determine whether the employee's conduct in associating himself with the Democratic Party comported with the common meaning of the word "independent." *Id.* at 1568-69.

McEntee's invitation to define the regulatory term "nonpartisan election" by reference solely to local election laws presents the identical risk of exalting form over substance that we identified and avoided in Campbell. We follow *Campbell's* well-reasoned approach in rejecting that invitation in favor of a consideration of all the relevant facts at hand.[5] The First Circuit reached the same conclusion when presented with a similar invitation to define the limits of the Hatch Act. *Magill v. Lynch*, 560 F.2d 22, 29 (1st Cir. 1977) (holding that "the government may constitutionally restrict its employees' participation in nominally nonpartisan elections if political

[5] Although Campbell interpreted the statutory scheme of the pre-1993 Hatch Act, the merit of its reasoning is not diminished by subsequent changes in the statutory language.

parties play a large role in the campaigns"). Accordingly, we affirm the Board's application of the rebuttable presumption analysis to determine whether McEntee's participation in a presumptively nonpartisan election constituted a violation of the Hatch Act.

C. The Constitutionality of the Hatch Act as Amended

McEntee argues that even if the rebuttable presumption analysis is not precluded by the terms of the current Hatch Act, its application violates the *First Amendment*. His constitutional arguments are premised on the concept that the analysis makes unlawful activities which are otherwise legal and therefore protected under the Hatch Act. Specifically, McEntee believes that the rebuttable presumption analysis unjustifiably burdens employees' constitutional rights to engage in political speech and that it is void for vagueness.[6]

As discussed above, McEntee's understanding of the effect of the analysis he refers to as the "transformation theory" is inaccurate. It is not a transformation as posited by McEntee that occurs, but rather a rebuttable presumption that is created. The rebuttable presumption analysis does not impose burdens on the political rights of employees beyond those provided for in the statute. Accordingly, McEntee's constitutional challenges are properly directed at the Hatch Act as amended.

Placed in the proper context, McEntee's constitutional arguments fail to acknowledge the clear precedent of the Supreme Court. The Court twice upheld the constitutionality of the pre-1993 Act against charges that it was vague, overbroad and placed an excessive burden on the free speech rights of federal employees. *Letter Carriers*, 413 U.S. at 556;

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[6] McEntee also asserts that the statute is overbroad, but his argument supporting that claim is indistinguishable from his assertion that the statute is void for vagueness. Accordingly, there is no need for us to separately address the overbreadth claim.

United Pub. Workers of Am. v. Mitchell, 330 US. 75, 93, 91 L. Ed. 754, 67 S. Ct. 556 (1947). Despite prior case law conclusively determining that the sweeping prohibitions of the pre-1993 Hatch Act did not excessively burden the protected rights of federal employees, McEntee attempts to argue that the more limited restrictions of the current statute impermissibly upset the balance of interests previously approved. McEntee's efforts are undermined by dicta from Letter Carriers in which the Court stated that the government has the power to prevent employees from engaging in precisely the activities with which McEntee is charged, namely "actively participating in fund-raising activities for a partisan candidate or political party" and "becoming a partisan candidate for, or campaigning for, an elective public office." *Letter Carriers*, 413 U.S. at 556. As we stated in our most recent prior case involving the Hatch Act, "precedent clearly precludes" an attack on the Act as an improper restraint on government employee speech[7]. *Briggs*, 331 F.3d at 1315.

McEntee asserts that while the Hatch Act itself may be constitutional, the application of the rebuttable presumption analysis is not because it blurs the dividing line between permitted and prohibited activities. This vagueness argument again fails to recognize that it is the statute, not the analysis,

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[7] The recent Supreme Court decision of *Republican Party of Minnesota v. White*, 536 U.S. 765, 153 L. Ed. 2d 694, 122 S. Ct. 2528 (2002), does not change that analysis. White involved a state canon of judicial conduct that prohibited candidates for judicial office from announcing their views on disputed legal or political issues. *Id.* at 768. Because the canon prohibited speech based on its content and burdened a core category of protected speech, the Court applied strict scrutiny to assess its constitutionality. *Id.* at 774. The Court struck down the canon on the ground that it was not narrowly tailored to achieve the allegedly compelling state interest of ensuring the impartiality of the state judiciary. *Id* at 780. Nothing in White, however, suggests that a statute, such as the Hatch Act, which is not targeted at restricting protected speech is subject to a heightened degree of scrutiny.

that creates this distinction. The appropriate inquiry, then, is not into the vagueness of the rebuttable presumption analysis, but rather whether the amended statute and its implementing regulations are sufficiently definite so as to give "fair warning . . . in language that the common world will understand, of what the law intends to do if a certain line is passed." *United States v. Lanier*, 520 US. 259, 265, 137 L. Ed. 2d 432, 117 S. Ct. 1219 (1997) (citation omitted). A statute will be found to be void for vagueness if it "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Id.*; *see also Grayned v. City of Rockford*, 408 U.S. 104, 108-09, 33 L. Ed. 2d 222, 92 S. Ct. 2294 (1972) (stating that vague statutes offend the principle that laws must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly"); *Coates v. City of Cincinnati*, 402 U.S. 611, 614, 29 L. Ed. 2d 214, 91 S. Ct. 1686 (1971) (holding a statute to be unconstitutionally vague because it subjected *First Amendment* rights to "an unascertainable standard"). In applying the void for vagueness doctrine in the *First Amendment* context, we have determined that the alleged vagueness must pose a real and substantial threat to protected expression such that a substantial amount of legitimate speech will be chilled. *Griffin v. Sec'y of Veterans Affairs*, 288 F.3d 1309, 1329-30 (Fed. Cir. 2002).

The only speech at issue here is that of federal employees serving as candidates for elective[8] office. McEntee argues

[8] The amended Hatch Act no longer restricts off-duty employees from engaging in other forms of expression connected with partisan political campaigns. *See* 5 C.F.R. § 734.205 (permitting off-duty employees to: "display pictures, signs, stickers, badges or buttons associated with political parties;" "initiate and circulate a nominating petition for a candidate for partisan political office;" "endorse or oppose partisan political candidates;" and "address a convention . . . or similar gathering of a political party").

that the statute does not clearly indicate that an employee-candidate's assertion of affiliation with a major political party could run afoul of the provisions of the Hatch Act. But the statute does not prohibit the bare speech with which McEntee is concerned. An employee-candidate is not barred from identifying his political philosophy, "I stand for the principles of the Republican Party," or stating his party status, "I am a Republican." The statute and regulations clearly indicate, however, that federal employees are not to participate as candidates in elections in which any candidate "represents" a major political party.

Although the term "represents" is not defined by the statute or the regulations, its ordinarily understood meaning includes more than the formal endorsement process advocated by McEntee. *See Best Power Tech. Sales Corp. v. Austin*, 984 F.2d 1172, 1177 (Fed. Cir. 1993) ("It is a basic principle of statutory interpretation . . . that undefined terms in a statute are deemed to have their ordinarily understood meaning."). While the definition of "represent" certainly includes "to be an accredited deputy or substitute for (a number of persons) in a legislative or deliberative assembly," it also encompasses "to describe as having a specified character or quality; to give out assert or declare to be of a certain kind" and "to symbolize, to serve as a visible or concrete embodiment." Oxford English Dictionary 657-58 (2d ed. 1989). Thus, the term "represent" as used in the Hatch Act refers not only to candidates who have received the formal endorsement of a major political party, but also to candidates who act in concert with a major political party. We hold that while an employee-candidate in a presumptively nonpartisan election may independently assert a party affiliation, once the candidate and the party act in concert with each other, a representative relationship may be established sufficient to rebut the presumption of nonpartisanship. Interpreted in this manner, the amended statute sufficiently puts an employee on notice that, when serving as a candidate for nonpartisan public office, he is prohibited

from engaging in speech and conduct that indicate he is acting in concert with a major political party.

McEntee further complains that the statute does not indicate the level of partisan speech and conduct required to rebut the presumption that an election deemed to be nonpartisan under state law was, in fact, a partisan race from which federal employees are banned. Admittedly, the statute does not give employees an absolute right to participate in elections deemed to be nonpartisan under state law, but rather it gives employees the right to participate in elections in which no candidate represents a major political party. Admittedly the statute identifies no bright line rule for the level of political speech and conduct, on the part of either the candidate or the party, that is necessary to establish representation of a major political party. Although the standard for what constitutes representation of a major political party is certainly flexible, "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Ward v. Rock Against Racism*, 491 U.S. 781, 794, 105 L. Ed. 2d 661, 109 S. Ct. 2746 (1989). McEntee has not established that the amended *Hatch Act* fails to "provide persons of ordinary intelligence a reasonable opportunity to know what is prohibited." *Cron*, 288 F.3d at 1330. We do not believe that t he statute is unconstitutionally vague.

D. Evidentiary Support for the Board's Determination

McEntee's final challenge to the Board's decision is that it is not supported by substantial evidence. McEntee bases this claim on the assertion that in order for an election designated as nonpartisan under state law to be considered a prohibited race, a candidate must receive a formal endorsement by a national, state, or local body of a major political party. Because McEntee received no such endorsement, he believes that the 2001 Albuquerque mayoral race did not constitute an election for a partisan political office. The error of this as-

sertion has been fully addressed above and does not need belaboring.

Although we do not attempt to establish the minimum level of partisan politics necessary to rebut the presumption that an election designated as nonpartisan under state and local law is, in fact, a prohibited political race, there is no question that the record here amply supports the conclusion that the presumption of nonpartisanship afforded the 2001 Albuquerque Mayoral race was so rebutted. Here, McEntee openly solicited members of the Republican Party for campaign contributions and made it clear that he was requesting donations on the basis of party affiliation in order to further the party's agenda. He trumpeted his endorsement by the Executive Committee of the Bernalillo County Republican Party and individual Republican Party figures and appeared at press conferences with his endorsers.[9] Furthermore, leaders of the local and state Republican Party actively supported McEntee by publicly associating themselves with his campaign, advocating his election, and helping to raise funds in support of his candidacy. While we leave open the possibility that less blatant invocation of party status may not justify rebutting the presumption of nonpartisanship, there can be no doubt that the combination of McEntee's conduct as a candidate and the Republican Party's acquiescence in that conduct constitutes representing a major political party such that the race in which he participated constituted an election for partisan

[9] McEntee contests the Board's decision to admit as evidence newspaper articles describing his campaign as partisan. There is ample evidence in the record supporting the Board's determination that the presumption of nonpartisanship was rebutted without relying on the challenged newspaper articles; therefore we need not address the merits of McEntee's objection.

political office.[10] The Board had substantial evidence to support its findings.

III. CONCLUSION

For the foregoing reasons, we affirm the Board's determination that McEntee violated the Hatch Act by running as a candidate for election to a partisan political office and by knowingly soliciting and receiving political contributions.

IV. COSTS

No costs.

AFFIRMED

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[10] McEntee also asserts that the precise point at which the election was established as partisan was not clear to him and therefore his fundraising efforts could not be described as the knowing solicitation or receipt of banned political contributions. The record does not support this assertion. It shows that he held a fundraising event on September 14, 2001, two weeks after he was formally notified that the OSC believed that his activities violated the Hatch Act and one week after the deadline by which he needed to withdraw his candidacy or resign his federal employment.

APPENDIX B

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

[Filed September 8, 2003]

DOCKET NUMBER CB-1216-02-0007-T-1

SPECIAL COUNSEL,

Petitioner,

v.

MIKE MCENTEE,

Respondent.

FINAL DECISION AND ORDER

The petitioner filed a complaint alleging that the respondent had violated the Hatch Act, 5 U.S.C. § 7323(a)(2) and (3), and requesting that the Board order an appropriate sanction. Case File (CF), Tab 1. By Order dated April 24, 2002, the administrative law judge found that the respondent violated the Hatch Act, as set forth in 5 U.S.C. § 7323, by being a candidate, while employed by the Federal Aviation Administration (FAA), in a partisan election, and by soliciting contributions in support of such candidacy. Accordingly, the administrative law judge granted petitioner's motion for summary judgment and denied respondent's motion to dismiss. CF, Tab 49. By decision dated August 7, 2002, the administrative law judge found removal to be too harsh a penalty and concluded that for this serious violation of the Hatch Act the respondent be suspended from his position with the FAA for a period of 120 days. CF, Tab 57. Both parties challenge the administrative law judge's decision. CF, Tabs 58-61.

The Board has jurisdiction over this case under 5 U.S.C. §§ 1215(a) and 1216(a)(1). Under 5 U.S.C. § 7323, a Federal employee may not "solicit . . . a political contribution from any person" and may not "run . . . as a candidate for election to a partisan political office." Under 5 U.S.C. § 7326, the Board must order the removal of an employee found to have violated section 7323, unless it finds by unanimous vote that the violation does not warrant removal. A lesser penalty, consisting of not less than 30 days' suspension with pay, may then be imposed. *Id.*

We accept and adopt the administrative law judge's reasoning and find unanimously that the penalty of removal is not warranted in this case. Accordingly, the Department of Transportation, Federal Aviation Administration is ORDERED to suspend the respondent from his Air Traffic Controller position for 120 days. The Office of Special Counsel is ORDERED to notify the Board within 30 days of the date of this final order whether the respondent has been suspended as ordered.

This is the final order of the Merit Systems Protection Board in this case.

NOTICE TO THE RESPONDENT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you

have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law as well as review the Board's regulations and other related material at our web site, http://www.mspb.gov..

FOR THE BOARD:
Washington, D.C.

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Bentley M. Roberts, Jr.
Clerk of the Board

APPENDIX C

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

[Filed August 7, 2002]

DOCKET NUMBER CB-1216-02-0007-T-I

SPECIAL COUNSEL,

Petitioner,

v.

MIKE MCENTEE,

Respondent.

RECOMMENDED DECISION

On November 20, 2001, the Petitioner filed a complaint alleging that the Respondent, an employee of the Federal Aviation Administration (FAA), had violated the Hatch Act, i.e. 5 U.S.C. § 7323 (a) (2) and (3), by becoming a candidate for public elective office in a partisan election and soliciting contributions in support of such a candidacy. Case File (CF), Tab 1. On April 24, 2002, I issued an order granting summary judgment in favor of the Office of Special Counsel. CF, Tab 49. I found that the Respondent, Mike McEntee, violated the Hatch Act by being a candidate, while employed by the Federal government, in a partisan election, and by soliciting contributions in support of such candidacy. *Id.* That order is incorporated herein by reference. Based on cross-motions for summary judgment and supporting briefs, CF, Tabs 28, 51, 52, I now turn to the appropriate penalty for the violation. For the reasons set forth below, I recommend that the Respondent be suspended from his position with the FAA for a period of 120 days.

Penalty

Under 5 U.S.C. § 7326, a Hatch Act violation requires the removal of the employee unless the Board decides, by a unanimous vote, that the violation does not require removal. A lesser penalty, consisting of not less than 30 days' suspension without pay, may then be imposed. 5 U.S.C. § 7326. In *Special Counsel v. Purnell*. 37 M.S.P.R.184, 200 (1988), *aff'd sub. nom., Fela v. Merit Systems Protection Board*, 730 F. Supp. 779 (N.D. Ohio 1989), the Board listed the primary factors that it considers when determining whether a penalty less severe than removal should be imposed for a Hatch Act violation: (1) the nature of the offense and the extent of the employee's participation; (2) the employee's motive and intent; (3) whether the employee had received advice of counsel regarding the activities at issue; (4) whether the employee had ceased the activities; (5) the employee's past employment record; and (6) the political coloring of the employee's activities: *See also Special Counsel v. Lee*, 58 M.S.P.R. 81, 91 (1993).

As noted above, I have found that the Respondent was a candidate for public elective office in a partisan election. The Board regards this kind of activity as a very serious violation of the Hatch Act. *See Special Counsel v. Seastrunk*, 28 M.S.P.R. 51, 54 (1985) (active candidacy in a partisan election is a grave and conspicuous violation of the Hatch Act). In considering the *Purnell* factors in this case, I note that the nature of the offense and the extent of the Respondent's participation are aggravating circumstances. This was a serious violation. The Respondent ran for public office in what should have been a non-partisan campaign, but he was responsible for the conduct that ultimately transformed the campaign from a non-partisan to a partisan one. I find, therefore, that the first factor identified above provides no basis for imposing a penalty less severe than removal.

The second factor concerns the employee's motive and intent. I cannot attribute an improper motive or intent to the Respondent's conduct. He obviously wanted to become the Mayor of Albuquerque, but he did not exhibit any particular animus that reflected negatively on his status as a federal employee. The Respondent did not attempt to coerce or otherwise pressure any federal employees and he is not a supervisor or a high-level employee with subordinates. CF, Tab 41. The Respondent did not conduct any campaign activities while on the job or the premises of the FAA. When he inquired with the Albuquerque FAA Ethics Counselor about the possibility of circulating a petition in order to collect signatures in support of his campaign, the Ethics Counselor informed him that such an act would violate the Hatch Act. CF, Tab 51, Exhibit MC47 at 29. The Respondent did not circulate such a petition after speaking with the Ethics Counselor. *Id.* The Respondent was diligent in his efforts to understand any Hatch Act restrictions including inquiring about Hatch Act restrictions with the Albuquerque FAA Ethics Counselor before and during his campaign, reviewing the Hatch Act and a list of prohibited and permitted activities before deciding to become a candidate for mayor, and receiving briefings on the Hatch Act during routine ethics training provided by the FAA. CF, Tab 41. The FAA Ethics Counselor informed the Respondent that he could run in a non-partisan election, and referred him to the regional counsel who also determined that he could run in such an election. CF, Tab 51, Exhibit MC47. I find that the employee believed he was acting within the bounds of the Hatch Act when he entered the race for mayor and began his campaign activities. Therefore, the "motive and intent" factor weighs in favor of the Respondent and supports a lesser penalty.

The third factor concerns whether the Respondent had received the advice of counsel regarding the activities at issue. It is undisputed that the Respondent consulted the FAA Ethics Counselor before beginning his campaign. *Id.* The

Respondent also consulted with attorneys during his efforts to understand any Hatch Act restrictions he may have violated after he was first contacted by the Special Counsel. CF, Tab 51, Exhibit MC49. The Special Counsel informed the Respondent that, in its view, the campaign had been transformed into a partisan campaign and thus his participation in it violated the Hatch Act. *Id.*, Exhibit MC4. This was, however, the judgment of a public prosecutor, not a deciding official. Moreover, the judgment was based on an analysis of transformation evidence, a necessarily fact-specific element that could only be determined conclusively after litigation. Although the Respondent could have withdrawn from the election or quit his job at the FAA, his decision not to do so was based on the advice of his attorney, and his reasonable belief that he was in compliance with the Hatch Act due to an erroneous presumption made by the Special Counsel. *Id.*, Exhibit MC49. The Special Counsel's letter of August 31, 2001, mistakenly stated that the Respondent had received the endorsement of the Bernalillo County Republican Party as opposed to the Executive Committee of the Bernalillo County Republican Party. *Id.*, Exhibit MC4. The law does not excuse a respondent's conduct simply because he followed the advice of counsel. *See Weston y. Department of Housing & Urban Development*, 724 F.2d *943,* 951 (Fed. Cir. 1983) (a party must be held accountable for the conclusions of her designated attorney to the extent that she acceded to those conclusions or permitted counsel to act in her stead). However, on balance, the fact that the Respondent sought and acted in accordance with the advice of the FAA Ethics Counselor and private counsel who was familiar with the Hatch Act weighs in his favor with regard to the penalty.

The fourth *Purnell* factor is whether the employee ceased the activities in question. While the Respondent did not withdraw from the election or end his employment with the FAA, the Respondent's deposition indicates that there were no further overt incidents of seeking or using partisan en-

dorsements after the notification of a possible Hatch Act violation by the Office of Special Counsel. CF, Tab 51, Exhibit MC49. The Respondent removed the word Republican from materials he distributed after he was contacted by the Special Counsel. *Id.* Thus, in a sense, at least, it can be said that the Respondent ceased the activities that had transformed the campaign. The effects of those activities—the past use of partisan endorsements—obviously lingered, but it appears that the Respondent muted such partisanship in the waning days of the campaign. However, since the Respondent failed to withdraw from the election altogether, this is neither an aggravating, nor a mitigating factor with regard to the penalty.

The fifth factor to consider is the respondent's employment record. The Respondent has a good employment record in a highly skilled position, which is of significance to our national safety, security and well-being. CF, Tab 51, Exhibit MC48. The Respondent has served 19 years as an air traffic controller with exemplary reviews. CF, Tab 52. The appellant has included reports, letters and awards attesting to his outstanding service spanning the period from 1984 until 2001. CF, Tab 51, Exhibit MC48. The Respondent's employment record supports a penalty that is less severe than removal.

The final factor to consider is the political coloring of the employee's activities. Candidacy in a partisan political election is a substantial and conspicuous violation of the Hatch Act with clear political coloring. *Special Counsel v. Alexander*, 71 M.S.P.R. 636 (1996). Since it was the Respondent's own political activities that transformed the non-partisan election into a partisan election, there was an obvious political coloring to the Respondent's conduct and his activities. While this would ordinarily be considered an aggravating factor, it must be measured in the context of the violation found in this case.

Unlike the usual case involving participation in a partisan election, the Respondent's candidacy was not initially violative of the Act. It only became unlawful later, under the transformation theory set forth in *In re Broering*, 1 P.A.R. 778, 779 (1955). It is significant that in the only reported case issued by the Board involving a Federal employee and the transformation theory set forth in *Broering*, 1 P.A.R. at 779, the penalty was a suspension rather than a removal. *See Special Counsel v. Campbell*, 58 M.S.P.R. 170, 183 (1993), *aff'd sub nom, Campbell v. Merit Systems Protection Board*, 27 F.3d 1560 (Fed. Cir. 1994) (Board found that a 30-day suspension was appropriate when a Federal employee's independent candidacy was not truly independent of a political party because he received a party endorsement and used party resources). Although *Broering* itself, which appears to have involved a Federal employee, was decided by the Board's predecessor agency, the penalty in that case was a 90 day suspension. Two other transformation cases involved state or local employees, where the Board's authority is limited to removing or not removing the affected employee. In *Special Counsel v. Yoho*, 15 M.S.P.R. 409, 414 (1983), the Board determined that a state employee violated the Hatch Act under the transformation theory, but the violation did not warrant removal. In *Special Counsel v. Mahnke*, 54 M.S.P.R. 13, 20 (1992), the Board found that the state employee involved in that case should be removed. Unlike in this case, however, in *Mahnke*, the employee had been previously warned that his participation in an earlier election was unlawful even though he was not charged with a violation for participating in that earlier election. *Id.* at 19. On notice not only of an earlier violation, but also on notice of what defined a partisan election, the employee nevertheless ran in another partisan election. *Id.* The warning was thus more complete and the defiance more serious in *Mahnke* than in this case.

Weighing all of the *Purnell* factors discussed above, I am of the view that removal here would constitute too harsh a

penalty. I believe a more finely tuned penalty and one that will deter future misconduct, both by the Respondent and any other federal employee who may consider following his example, is a suspension of 120 days. The Respondent should be on notice that any future violation would likely result in discharge. That is, in my view, a sufficient inoculation against a recurrence of the "bug" that often afflicts those with visions of public office. There are numerous other ways to perform public service beyond one's federal employment that do not run afoul of the Hatch Act. I suggest that the Respondent pursue these other options. Accordingly, I recommend that for his serious violation of the Hatch Act, the Respondent receive a penalty greater than the minimum penalty and be suspended from his position with the FAA for a period of 120 days.

EXCEPTIONS

The parties have 35 days from the issuance of this recommended decision to file any exceptions to the decision with the Clerk of the Board, Merit Systems Protection Board, 1615 M Street, NW., Washington, DC 20419. The parties also may file replies to any exceptions within 25 days after the date of service of the exceptions.

FOR THE BOARD:

/s/ Robert A. Goannasi
ROBERT A. GIANNASI
Administrative Law Judge

APPENDIX D

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

[Filed April 24, 2002]

DOCKET NUMBER CB-1216-02-0007-T-1

SPECIAL COUNSEL,

Petitioner,

v.

MIKE MCENTEE,

Respondent.

ORDER GRANTING SUMMARY JUDGMENT

On November 20, 2001, the Petitioner filed a complaint alleging that the Respondent had violated the Hatch Act, i.e., 5 U.S.C. § 7323(a)(2) and (3), and requesting that the Board order an appropriate sanction. The complaint specifically alleges that the Petitioner, while employed by the Federal Aviation Administration (FAA), was a candidate in a partisan election and solicited contributions in support of such candidacy. Case File (CF), Tab 1. The Respondent filed a motion to dismiss on February 26, 2002. CF, Tab 15. The Petitioner also submitted a motion for and memorandum in support of summary adjudication. CF, Tab 28. The parties have each filed appropriate responses and replies to these two opposing motions. CF, Tabs 26, 39, 46 and 48.

The parties have agreed that the motion for summary adjudication should be limited to a determination of whether the Hatch Act has been violated. CF, Tab 44. The determination of any possible penalty has been reserved for a later, bifurcated proceeding. *Id.* Summary judgment or adjudication

is normally appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Special Counsel v. Dominguez*, 55 M.S.P.R. 652, 655 (1992) (the Chief ALJ granted petitioner's motion for summary judgment, finding it "proper and efficacious" to do so in the absence of any "triable issue of fact"). I find that there are no genuine issues as to any material fact in this matter and I may properly determine whether the Hatch Act has been violated without the necessity of a hearing.

Statement of Material Facts Not in Dispute

Since November 2, 1982, Mike McEntee has been employed by the FAA as an air traffic control specialist. CF, Tab 28, Exhibit 1 at 3. On or about August 8, 2001, McEntee filed a declaration of candidacy to run for Mayor of Albuquerque in an election that was to be held on October 2, 2001. *Id.*, Exhibit 2; Exhibit 5 at 13. Section 2-4-7 of the City of Albuquerque Code of Ordinances provides that "[t]he names of all certified candidates for office shall be listed on the ballot without party or other designation." *Id.*, Exhibit 4 at 1. Article II, Section 4 of the City Charter provides that "[t]he ballots shall be printed by the city and shall contain the names of the candidates without party or other designation." *Id.*, Exhibit 21 at 2. When McEntee became a candidate for Mayor, a campaign checking account was established under the name, "Friends for Mike McEntee." *Id.*, Exhibit 5 at 18.

Campaign materials were distributed by and on behalf of the McEntee campaign. One of the campaign leaflets states: "Mike McEntee—the ONLY CONSERVATIVE REPUBLICAN in the race for Mayor." It also states: "Finally, Republicans have a chance to elect a Conservative to lead our city." The leaflet also contains the following quote from Former Republican State Representative Frank Bird:

> For years Republicans have been forced to hold their nose and accept the policies that city government forced

> on them by Jim Baca, Marty Chavez and the rest of the liberal Democrats. Now, for the first time in years we have a chance to elect one of us, a conservative Republican to clean up the mess in City Hall.

The leaflet was paid for by "Friends for Mike McEntee." *Id.*, Exhibit 6, all emphasis in this paragraph is in the original. In his deposition, McEntee admitted that he "probably authorized" this leaflet. *Id.*, Exhibit 5 at 27.

McEntee also admitted that he "probably" authorized two other campaign leaflets, also paid for by "Friends for Mike McEntee," which described him as "The *ONLY* Conservative Republican!" *Id.*, Exhibits 7 and 8, emphasis in original; Exhibit 5 at 26.

McEntee also "assumed" that he authorized the following "Dear Friend" letter, also paid for by "Friends for Mike McEntee." The letter was described in a heading as being from Jack Stahl, "Former Republican Lieutenant Governor." It states, "*In two months, we can FINALLY elect a REPUBLICAN MAYOR to lead this city!*" The letter also makes the following statements: "As Republicans, we know that this is the first time in years—and probably the last time in even more years that we have a chance to elect a Republican Mayor to bring conservative values and principles to City Hall."; "IF REPUBLICANS UNITE BEHIND THE ONLY CONSERVATIVE REPUBLICAN, MIKE McENTEE . . . WE WIN!"; "We Republicans can turn Albuquerque into a great city, but we need your help twice. First; WE NEED YOUR VOTE, Second; *We need your financial support now so Mike McEntee can put his Conservative Republican message in the mail, on TV and on radio.*"; "Our city is crying out for new REPUBLICAN leadership."; and "WE REPUBLICANS CAN MAKE A DIFFERENCE!" Finally, the letter lists the alternatives to McEntee, all of whom are identified as "Democrat." *Id.*, Exhibit 9, all emphasis in this paragraph is in the original.

Another letter, which McEntee admitted he "probably" approved, is addressed, "Dear Republican Friend." It states, "As Republicans, we are outnumbered in Albuquerque. Our only hope of defeating the Democrat machine is to stick together behind one candidate. At last count there were at least 10 candidates saying they were running for Mayor, most of them Democrats like Baca and Chavez." *Id.*, Exhibit 15; Exhibit 5 at 23.

The record contains a press advisory, dated August 23, 2001 and paid for by "Friends for Mike McEntee." The press advisory states, "Former Congressman Bill Redmond joined with 10 Republican legislators and grassroots Republican leaders to announce their endorsement of Republican candidate for Mayor, Mike McEntee, at a press conference on Wednesday, August 22, 2001." It also quotes Senator Mark Boitano, who, reading from a letter from Congressman Redmond, stated, "Republicans need to stand behind the candidate who will stand for the values that Republicans hold dear." McEntee was present at the press conference mentioned in the advisory. *Id.*, Exhibit 14; Exhibit 5 at 29-30.

In addition, the record contains a campaign leaflet wherein the "Friends for Mike McEntee," which paid for the leaflet, invited Albuquerque's kids to "[flake a shot at wasted spending at our Dunk the Dems' tank," an event it sponsored. *Id.*, Exhibit 16.

The record also contains evidence of endorsements from Republican or Republican-related entities. In a deposition, Ken Zangara, Chairman of the Bernalillo County Republican Party, testified that a majority of the members of the Executive Committee of the Bernalillo County Republican Party voted to endorse McEntee. *Id.*, Exhibit 11 at 9-10; Tab 47, Exhibit 40. According to Zangara, the Executive Committee serves advisory, fund-raising and Republican outreach roles in the county Republican Party, but it does not govern the Party. *Id.*, Exhibit 11 at 8 and 20. In any event, the endorse-

ment of the Executive Committee was announced at a press conference held on August 20, 2001. Both Zangara and McEntee were present at the press conference. *Id.*, Exhibit 5 at 35 and 37; Exhibit 11 at 14; Exhibit 10. A written statement, prepared on McEntee's behalf after the endorsement, declares "I am also proud to have the endorsement of the Bernalillo County Republican Executive Committee." *Id.*, Exhibit 12; Exhibit 5 at 45; Tab 47, Exhibit 41.

The same press advisory, paid for by "Friends for McEntee," that described the endorsements of Republican leaders and office-holders, discussed above, announced that both the Republican Assembly and the Republican Lincoln Caucus endorsed McEntee. *Id.*, Exhibit 14. According to McEntee's deposition testimony, these are groups of people who meet regularly and discuss topical issues and "tend to be Republican people and very conservative." *Id.*, Exhibit 5 at 62-63.

The McEntee campaign also solicited campaign contributions. The "Dear Republican Friend" letter discussed above states, "If you can help with a small contribution we will be very appreciative." *Id.*, Exhibit 15 at 2. The "Dear Friend" letter from Jack Stahl discussed above states, SEND MIKE McENTEE A CHECK FOR AS MUCH AS YOU CAN AFFORD, and "You [sic] contribution of $25, $50, $100 or even $1000 is vital." *Id.*, Exhibit 9; Exhibit 5 at 28; Exhibit 1 at 23. In another "Dear Friend" letter not previously discussed, but authorized by McEntee and paid for by "Friends for Mike McEntee," the campaign asked for contributions so that McEntee's message could by distributed by mail, TV and radio. *Id.*, Exhibit 17; Exhibit 5 at 29. Contributions for the McEntee campaign were solicited on postcards paid for by "Friends for Mike McEntee" and the campaign website stated that credit cards were accepted. *Id.*, Exhibit 20; Exhibit 5 at 24. At least two fundraising events were held in support of the McEntee campaign, one on or about June 21, 2001 and another on or about September 14, 2001. *Id.*, Exhibit 18; Exhibit 19.

Petitioner also refers to four newspaper articles that discuss the connection between the Republican Party and McEntee during the campaign. One article, published in the Albuquerque Journal titled "County GOP Back McEntee for Mayor," states:

> City Council or Mike McEntee's campaign for mayor won an endorsement Monday from county Republican leaders. "We just feel like Mike's earned this endorsement," said Ken Zangara, chairman of the Republican Party of Bernalillo County. * * * Zangara made the announcement during a news conference on Monday. He said the executive committee of the Bernalillo County Republican County decided during a meeting Monday to make the Endorsement.

Id., Exhibit 26.

Another article in the Albuquerque Tribune, dated August 23, 2001 and titled "Party Time? Open Republican endorsement stirs up supposedly nonpartisan election, "states:

> All gave fiery GOP speeches, but they're not candidates in Albuquerque's tight mayoral race. The man they're backing, City Councilor Mike McEntee, is. And he's a Republican. It was a wide-open showing of party backing in what's supposed to be a non-partisan mayoral election. * * * Part I of this push in the city election, which takes place on Oct. 2 actually occurred Monday when the Bernalillo County Republican Party Executive Committee made it clear McEntee was its man for mayor. "Republicans have a big stake in the mayoral election," county GOP Chairman Ken Zangara said in announcing the McEntee endorsement. * * * State Republican Party Chairman John Dendahl said the county GOP's actions take the "cloak off" claims that party politics doesn't control city government. "We don't believe in shams," he said. "We believe in doing it in front of God and everyone, and that's what we have done." He said the county party's efforts signal the GOP is serious about

> putting a Republican in the mayor's office again. McEntee, whose campaign has struggled to catch fire, is eagerly wrapping himself in the Republican flag.

Id., Exhibit 27.

Still another article in the Albuquerque Journal titled "GOP Radar focuses On McEntee" states:

> Now he's the local Republican Party's anointed candidate for Mayor. * * * [H]e has been embraced by the Republican Party hierarchy, including state chairman John Dendahl, National Committeeman Mickey Barnett and former state Sen. Duncan Scott, who offered up his home for the June 21 fundraiser. Last month, the Bernalillo County Republican Party endorsed McEntee over Republican Bob Schwartz. * * * As the sun set on his fundraiser, McEntee stepped to the microphone and stayed true to form. His message was simple: "We need a Republican on the 11th floor."

Id., Exhibit 28.

On or about August 30, 2001, Office of Special Counsel attorney Amber Bell spoke to McEntee. In his deposition, McEntee admitted that Bell explained to him Petitioner's view that his candidacy for Mayor violated the Hatch Act. She told him that he could either get out of the Mayor's race or resign his federal position. McEntee answered that he did not think he was in violation of the Hatch Act. *Id.*, Exhibit 5 at 49-50. In a letter dated August 31, 2001, another Office of Special Counsel official, William El Reukauf, notified McEntee that his candidacy for Mayor violated the Hatch Act. The letter said that McEntee could correct his violation by withdrawing from the election or resigning his federal position. *Id.*, Exhibit 23 at 2-3. McEntee did not withdraw from the race and he did not resign his position with the FAA. *Id.*, Exhibit 24 at 4.[1]

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[1] The election was held as scheduled and McEntee was not elected.

Analysis

Under 5 U.S.C. § 7323(a)(3), and 5 C.F.R. § 734.101, an employee of a Federal Executive agency may not run for the nomination or as a candidate for election to a partisan political office. The Respondent has been employed by the FAA as an Air Traffic Control Specialist since 1982. CF, Tab 28, Exhibit 1 at 3; Exhibit 5 at 10. In August, 2001, he filed a Declaration of Candidacy to run for Mayor of Albuquerque. *Id.*, Exhibit 2; Exhibit 5 at 13. A "candidate for election" is one who "seeks nomination or election to any elective office whether or not the person is elected." 5 C.F.R. § 734.101. A "partisan political office" is one for which "any candidate is nominated or elected as representing a party any of whose candidates for Presidential elector received votes in the last political election at which Presidential electors were selected . . . . " *Id.* Candidacy in a partisan political election is a substantial and conspicuous violation of the Hatch Act with clear political coloring. Special Counsel v. Alexander, 71 M.S.P.R. 636 (1996).

It is undisputed that the Respondent was an employee covered by the Hatch Act and that he was a candidate for election. Thus, the issue before me now is whether the election was partisan. The City of Albuquerque Code of Ordinances and the Charter of the City of Albuquerque provide that the names of the candidates in the mayoral election are listed without party or other designation. *Id.*, Exhibit 4 at 1; Exhibit 21 at 2. Since party affiliation did not appear on the ballot for the election, the election is presumed to have been nonpartisan. In re Broering, 1 P.A.R. 778, 779 (1955). Such a presumption, however, is rebuttable. *Id.*

In Broering, the Civil Service Commission (CSC) held that a presumption of nonpartisanship "may be rebutted by evidence showing that partisan politics actually enter the campaigns of the candidates." *Id.* This "may be shown by the fact that the candidates [were] nominated or endorsed by State or

national political parties or the local political committee of such a State or national party." *Id.* The CSC also held, however, that each case arising under the "nonpartisan" exception to the candidacy prohibitions in the Hatch Act "must necessarily stand or fall on the facts peculiar to it." *Id.* at 778. Thus, Broering does not establish that the existence of a State or national political party or local committee endorsement is the only way to rebut a presumption of nonpartisanship. The standard is whether there exists "evidence showing that partisan politics actually enter the campaigns of the candidates." *Id.* at 779.

The body of CSC law interpreting the Hatch Act is not binding on the Board, but the Board looks to this case law for instruction. *Special Counsel v. Bradford*, 69 M.S.P.R. 247, 249 (1995). The Board has, however, adopted the Broering framework for determining whether elections were partisan in other cases involving purportedly nonpartisan elections. *See Special Counsel v. Yoho*, 15 M.S.P.R. 409, 411 (1983); *Special Counsel v. Mahnke*, 54 M.S.P.R. 13, 17 (1992). The Board has also applied this concept in related cases involving "independent" candidacies that were actually considered partisan candidacies under the Hatch Act. *See Special Counsel v. Campbell*, 58 M.S.P.R. 17.0 (1993), *aff'd sub nom, Campbell v. Merit Systems Protection Board*, 27 F.3d 1560 (Fed. Cir. 1994) (although a Federal employee was permitted to be an independent candidate in a partisan election under 5 U.S.C. § 7325, his candidacy was found to violate the Hatch when his candidacy was not truly independent of a political party because he received a party endorsement and used party resources). In light of *Broering* and the subsequent Board adoption of its framework, I must determine whether the Petitioner has shown that the election for Mayor of Albuquerque in October 2001, although ostensibly non-partisan, was actually partisan in nature. The Petitioner, of course, bears the burden of proving this proposition by a preponderance of the evidence. *See Special Counsel v. Purnell*, 27 M.S.P.R. 184,

188 (1988), *aff'd sub nom, Fela v. Merit Systems Protection Board*, 730 F.Supp. 779 (N.D. Ohio 1989).

The election was a partisan election under Broering and its progeny

The Petitioner has shown by a preponderance of the evidence that the election at issue was partisan. Indeed, the evidence is overwhelming not only that the election was partisan, but that McEntee contributed significantly to the partisanship. Partisan politics played a key role in the Respondent's campaign. The Respondent repeatedly described himself as a "conservative Republican" during campaign events. Materials financed and authorized by the McEntee campaign prominently declared him to be the "the only conservative Republican in the race for Mayor" or "the only conservative Republican." One sign that was paid for by the campaign stated, "Finally, Republicans have a chance to elect a Conservative to lead our city." CF, Tab 28, Exhibit 6.

The Respondent openly declared, in a letter to "Republican friends," that his candidacy was the opportunity for Republicans to defeat "the Democratic machine." *Id.*, Exhibit 15. His campaign sent out another letter, signed by former Republican Lieutenant Governor Jack Stahl, stating that, "if Republicans unite behind the only conservative Republican, Mike McEntee . . . we win!" *Id.*, Exhibit 5. That letter also stated that, "We need your financial support now so Mike McEntee can put his Conservative Republican message in the mail, on TV, and on radio"; "As Republicans, we know that this is the first time in years . . . that we have a chance to elect a Republican Mayor . . ."; and "Our city is crying out for new REPUBLICAN leadership." *Id.*

Press advisories and other campaign material announced that prominent Republican office-holders, entities and functionaries were supporting McEntee. For example, one such press advisory announced that "Bill Redmond joined with 10

Republican legislators and grassroots Republican leaders to announce their endorsement of Republican candidate for Mayor, Mike McEntee." The campaign also announced the endorsement of the Respondent's candidacy by the Republican Assembly and the Republican Lincoln Caucus, as well as the endorsement of the Bernalillo County Republican Executive Committee. *Id.*, Exhibit 14; Exhibit 12. The Respondent specifically trumpeted these endorsements. For example, in campaign material titled, "Statement of Mike McEntee," the candidate stated, "I am . . . proud to have the endorsement of the Bernalillo County Republican Executive Committee. I am proud to have the endorsements of dozens of current and former elected Republicans." *Id.*, Exhibit 12.

The Respondent's reliance on his status as a Republican and his endorsements by Republican office-holders, functionaries and entities made its way into press reports, as McEntee obviously intended. Newspaper reports covered those aspects of the campaign, and thus the public perception of the campaign was that it was partisan. McEntee did not at the time dispute the nature of those reports. Indeed, he answered them in kind. Thus, the campaign issued an editorial under the Respondent's name stating that, "[t]he Journal is irate because I believe in the conservative values embraced by Republicans and am open and honest enough to proudly call myself a Republican."[2] *Id.*, Exhibit 13.

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[2] Respondent objects to use of the newspaper articles because he alleges they are hearsay. But Respondent's objection is unavailing. First of all, the newspaper articles are not being utilized for the truth of their contents, but rather to show the effect on the public of Respondent's reliance on partisan appeals and endorsements. McEntee has no legitimate grounds to object that newspapers covered his press advisories and public statements and distributions. Indeed, that is what he intended. In any event, it is clear that hearsay is admissible in administrative proceedings, particularly where, as here, such evidence corroborates other non-hearsay evidence. *Fouquet v Department of Agriculture*, 82 M.S.P.R. 548, 553 (1999).

These examples provide overwhelming evidence that the Respondent not only openly campaigned as a Republican, but was labeled a Republican in this campaign by the press and by others. It is clear from the evidence that partisan politics not only entered the campaign of the Respondent, but played a key and substantial role. Thus, although the local election laws provided for a nonpartisan election, the Respondent's and his campaign's partisan political actions prove that this was in fact a partisan election under *Broering*, 1 P.A.R. at 779.

Respondent's Defenses Are Without Merit

The Respondent does not dispute the essential facts in this case, most of which are based on documentary evidence from the McEntee campaign. Respondent does, however, seem to question whether the essential facts support the concluding inference of partisanship. For example, Respondent asserts that, during the campaign, he simply identified who he was—a conservative Republican. Alas, he would have had a stronger case had he stopped after simply identifying himself as a conservative, a less loaded description than the one he used and one that would not necessarily connote a political party. But his repeated references to his party affiliation and his concomitant references to some of his opponents as being from the other major political party in an attempt to reap political support makes clear that Respondent stepped over the line that might distinguish mere philosophical rhetoric from prohibited political partisanship. Respondent also questions whether the endorsement of the Executive Committee of the Bernalillo County Republican Party was significant enough to support a finding of partisanship. On the one hand, he contends that it was only the individual members of the Committee who endorsed him, and, on the other, he deprecates the importance of the endorsement, arguing that the Committee was simply advisory and played no operational role in running the affairs of the Party. This post-election

litigation position is at odds with his campaign position, which trumpeted the endorsement of the Committee. It is, of course, a truism that entities and committees act through individuals. But the McEntee campaign focused on the Committee, not the individual members, when it announced the endorsement. Moreover, whatever the Committee's role in the Party, its endorsement of McEntee was prominently advertised by his campaign as a Republican endorsement. Understandably, the message was picked up by the press, as intended by the candidate, as a Republican endorsement. Nor did this endorsement stand alone. There were other endorsements, from individuals, office-holders identified as such, and entities, which were touted as Republican endorsements. And there was, of course, other evidence of partisan campaigning. Thus, Respondent's efforts to downplay the evidence in these two respects are insufficient to defeat the inference that the weight of the uncontroverted evidence—mostly of campaign material—created an aura of partisanship that was both pervasive and influential.

Respondent's main contention seems to be that the application of the *Broering* line of cases to this case infringes his Constitutional rights. That contention is clearly without merit. The Hatch Act's restrictions against candidacy in partisan elections have been upheld as passing Constitutional muster by the Supreme Court. *See United Public Workers of America v. Mitchell*, 330 U.S. 75 (1947); *U.S. Civil Serv. Comm'n v. National Ass'n of Letter Carriers, AFL-CIO*, 413 U.S. 548 (1973). Nor, contrary to the Respondent's contention, do the 1993 amendments to the Hatch Act impact the *Broering* line of cases. The Respondent relies on that portion of the 1993 amendments, set forth at 5 U.S.C. § 7321, which states that "[e]mployees should be encouraged to exercise fully, freely, without fear or penalty or reprisal and to the extent not expressly prohibited by law their right to participate in or to refrain from participating in the political processes of the nation." From that language, the Respondent argues that the

Hatch Act contains no express prohibitions against participating as a candidate in a nonpartisan election. CF, Tab 15. The Respondent is not, however, being charged with being a candidate in a nonpartisan election. The Respondent has been charged with engaging in activities "expressly prohibited by law"—being a candidate in a partisan election and soliciting contributions in support of that candidacy in violation of 5 U.S.C. § 7323(a)(2) and (3). CF, Tab 1. The 1993 Amendments did not change the prohibitions at issue in this case, which have been in effect since the enactment of the Hatch Act. Nor did they address the *Broering* line of cases, which holds that an election designated as nonpartisan according to local law, may, in fact, be a partisan election if partisan politics are shown to have affected the campaign. Since participation as a candidate in a partisan political election is still expressly prohibited by the Hatch Act, Respondent's contention that the 1993 amendments somehow legitimatize his conduct must fail.

Respondent also appears to contend that an ostensibly nonpartisan election can never be turned into a partisan election. In support of his position, Respondent relies upon, but completely misreads, *Magill v. Lynch*, 560 F.2d 22 (1st Cir. 1977). That decision supports the Special Counsel's position rather than Respondent's. In Magill, the question was whether a local restriction on "becoming a candidate for any city office" was constitutionally overbroad because it banned "participation in nonpartisan" as well as partisan campaigns. *Id.* at 25, 30. Because the record was insufficient to determine whether the restriction was overbroad, the First Circuit remanded the case for further hearing. The Court's analysis, however, was consistent with the Supreme Court's analysis of the constitutionality of the Hatch Act in *Mitchell and Letter Carriers*, cited above. Indeed, the First Circuit endorsed the very principle involved in Broering when it stated that "the government may constitutionally restrict its employees' participation in nominally nonpartisan elections if political par-

ties play a large role in the campaigns." *Magill*, 560 F.2d at 29. The Court rejected any notion that it should rely "exclusively on how the city labels its elections." *Id.*, at note 5.

Solicitation of campaign contributions by the Respondent

The Respondent has admitted that he solicited and received contributions in support of his candidacy for Mayor. CF, Tab 41. 5 U.S.C. § 7323(a)(2) prohibits the knowing solicitation, acceptance or receipt of political contributions. A "political contribution" is "any gift, subscription, loan, advance, or deposit of money or anything of value, made for any political purpose." 5 C.F.R. § 734.101. A "political purpose," in turn, is defined as "an objective of promoting or opposing a . . . candidate for partisan political office . . ." 5 C.F.R. § 734.101. In light of my findings above that the 2001 Albuquerque Mayoral election was partisan, the Respondent's solicitation of political contributions in support of his candidacy in that partisan election also violated the Hatch Act. 5 U.S.C. § 7323(a)(2).

Conclusion

For the reasons stated above, I find and conclude that the Respondent violated the Hatch Act, as set forth in 5 U.S.C. § 7323, by being a candidate, while employed by the Federal Government, in a partisan election, and by soliciting contributions in support of such candidacy. Accordingly, the Petitioner's motion for summary judgment is GRANTED and the Respondent's motion to dismiss is DENIED. I shall convene a conference call at my earliest opportunity in order to discuss the procedure for deciding the appropriate penalty in this case.

FOR THE BOARD:

/s/ Robert A. Giannasi
ROBERT A. GIANNASI
Administrative Law Judge